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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 504

EASTERN AIR TRANSPORT, INC., APPELLANT;

vs.

SOUTH CAROLINA TAX COMMISSION AND W. G. QUERY, J. P. DERHAM, AND FRANK C. ROBINSON, ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

FILED NOVEMBER 4, 1931

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INDEX

	Original	Print
Record from district court of the United States, Eastern South Carolina	1	1
Caption (omitted in printing)	1	
Notice of motion for temporary restraining order (omitted in printing)	3	
Bill of complaint	3	1
Affidavit of William H. White, Jr. (omitted in printing)	16	
Affidavit of Frank W. Whitmore (omitted in printing)	31	
Temporary restraining order	40	13
Affidavit of H. W. Beisley (omitted in printing)	41	
J. C. King	43	14
H. A. Elliott	44	15
Exhibit "A"—Certificate of incorporation of Pitcairn Aviation, Inc. (omitted in printing)	49	
Exhibit "B"—Invoice (omitted in printing)	62	
Answer	63	19
Affidavit of W. G. Query	71	23

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	Original	Print
Reply affidavit of W. G. Query	73	24
Exhibits "A" to "G"—Application for license, license, monthly reports, etc. (omitted in printing)	79	
Affidavit of B. R. Stroup	103	28
Order calling three-judge court	106	30
Opinion, Parker, J.	107	30
Findings of fact and conclusions of law	117	38
Decree denying interlocutory injunction	121	41
Petition for appeal	123	42
Assignment of errors	125	43
Order allowing appeal and restraining defendants pending appeal	129	46
Bond on temporary restraining order (omited in printing)	131	
Supersedeas bond (omitted in printing)	132	
Bond for costs (" " ")	134	
Stipulation as to record (" " ")	136	
Citation and service (" " ")	137	
Clerk's certificate (" " ")	139	
Statement of points to be relied upon and designation of parts of record to be printed	140	47
Designation of additional parts of record to be printed	144	48

[fols. a & 1 & 2]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF SOUTH CAROLINA

EASTERN AIR TRANSPORT, INC., Complainant,

against

SOUTH CAROLINA TAX COMMISSION and W. G. QUERY, J. P. Derham and Frank C. Robinson, as Members of South Carolina Tax Commission, Defendants.

[fol. 3] BILL OF COMPLAINT—Filed April 16, 1931

To the Honorable, the Judge of the District Court of the United States for the Eastern District of South Carolina:

Eastern Air Transport, Inc., a corporation organized and existing under and by virtue of the laws of the State of Delaware, and a citizen and resident of the State of Delaware, on behalf of itself and of others similarly situated presents this its bill of complaint against the South Carolina Tax Commission and W. G. Query, J. P. Derham and Frank C. Robinson, as members of the South Carolina Tax Commission, and each of them, and alleges:

1. That the complainant is now and was at all times hereinafter mentioned a corporation duly created, organized and existing under the laws of the State of Delaware and a citizen and resident of the State of Delaware, having its principal office at No. 100 10th Street, in the City of [fol. 4] Wilmington, in said State, and is not and has not been a citizen or resident of the State of South Carolina.

2. That the defendants, W. G. Query, J. P. Derham and Frank C. Robinson, are citizens, residents and inhabitants of the State of South Carolina and of the Eastern District thereof, and that they are the duly and legally appointed, qualified and acting members of the defendant, South Carolina Tax Commission, and that as such members of the South Carolina Tax Commission they are charged with the duty of collecting certain taxes in the State of South Carolina, including particularly those taxes hereinafter mentioned.

3. That the grounds upon which the jurisdiction of this honorable Court depends are that this action arises under the laws of the United States and the provisions of the Constitution of the United States and the amendments thereto, that the complainant is a citizen, resident and inhabitant of one of the States of the United States other than the State of South Carolina, to wit: the State of Delaware; that each and all of the defendants are citizens, residents and inhabitants of the State of South Carolina; that a complete diversity of citizenship exists between the complainant and defendants in this action; that this is a civil suit in equity; and that the matter in dispute exceeds, exclusive of costs and interest, the sum of value of Three Thousand ($3,000.00) Dollars.

4. That this is a suit to enjoin the defendants from illegally enforcing or collecting an unconstitutional and illegal tax levied and imposed by the State of South Carolina and the defendants upon the complainant and its interstate business and commerce and the incidents thereof in violation of certain provisions of the Constitution and laws of the United States.

5. That the value of the right of complainant to do and transact said interstate business and commerce in and through the State of South Carolina without being subjected to said unconstitutional, illegal and void taxation is in excess of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs.

6. That unless the defendants be restrained and enjoined by this Court from said illegal enforcement and collection of said tax complainant will be forced by the defendants to [fol. 5] pay to the defendants and the State of South Carolina such tax on its interstate business in an amount in excess of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs, in order for complainant to carry on its interstate business and commerce as hereinafter more in detail set forth.

7. That complainant is now, and for a long time prior hereto has been, engaged in and intends to continue to carry on and transact interstate commerce and business, that is to say, Eastern Air Transport, Inc., is now, and for a long time prior hereto has been engaged in and in-

tends to continue to carry on and transact interstate commerce and business in the transportation of United States mail by airplanes for compensation and profit in and over the State of South Carolina from points outside of the boundaries thereof to points within, and from points within the State of South Carolina to points outside the boundaries thereof, and from points outside the State boundaries across the State of South Carolina to other points outside the boundaries thereof, and since December 10, 1930, has been similarly engaged in the transportation of passengers and their personal baggage, also small quantities of freight or express matter, all of which have been transported in complainant's airplanes, each and every one of which is and was engaged in making an interstate fight.

8. That the said interstate mail operations of complainant are carried on under and in accordance with the terms of a contract existing between the complainant and the United States Government for the regular transportation of United States air mail over a fixed and definite route approximately fifteen hundred (1,500) miles in length along the Eastern Seaboard of the United States from New York City (Newark, N. J., airport) via Philadelphia, Pa., Washington, D. C., Richmond, Va., Greensboro, N. C., Spartanburg, S. C., Greenville, S. C., Atlanta, Ga., and Jacksonville Fla. to its Southern terminus at Miami, Fla. complainant operating between Atlanta, Ga., and New York City, two planes per day each way on regular schedules, also, since April 1, 1931, an additional route with the airplanes of complainant stopping at the cities of Florence and Charleston, S. C., said contract for the carriage of mail [fol. 6] being dated the 7th day of November, 1930, and copy thereof hereto attached.

9. That the transportation operations of complainant in and over the State of South Carolina are exclusively in interstate commerce; that no mail, passengers or freight are accepted by complainant at either Greenville, Spartanburg, Florence or Charleston, for transportation solely to one of the other named points.

10. That it is necessary to generate the motive power used by complainant in the said operation and propulsion

of its said airplanes in said interstate commerce by the exclusive use of gasoline as fuel in the internal combustion motors of said airplanes.

11. That a considerable portion of said gasoline used by complainant as aforesaid on the said route is necessarily put into said airplanes at Spartanburg, S. C., and/or Greenville, S. C., and/or Florence, S. C., and/or Charleston, S. C., and that it is frequently necessary that complainant's airplanes refuel with gasoline at one or more of said cities in their operation across, into and out of the State of South Carolina.

12. That the said gasoline with which the said airplanes are refueled at Greenville, Spartanburg, Charleston and Florence, S. C., is an instrumentality of interstate commerce, and that it is impossible for said interstate commerce to be carried on without refueling at Greenville and/or Spartanburg and/or Charleston and/or Florence, S. C.

13. That an Act of the General Assembly of the State of South Carolina, approved February 23, 1922 (South Carolina Acts 1922, pages 835-838) as amended by Act No. 146 of 1923, Act No. 731 of 1924, Act No. 34 of 1925, and Act No. 102 of 1929 (South Carolina Acts, 1929, pages 107-112) provides in part:

"Section 1. License Tax on Dealers in Gasoline—Collection.—Be it enacted by the General Assembly of the State of South Carolina: That every oil company, person, firm or corporation doing domestic or intra-state business within this State, and engaging in the business of selling, consigning, using, shipping, or distributing for the purpose [fol. 7] of sale within this State, any gasoline or any substitute therefor, or combination thereof, for the privilege of carrying on such business shall be subject to the payment of a license tax, which tax shall be measured by and graduated in accordance with the volume of sales of such oil company within the State. Every such oil company shall pay to the State an amount of money equal to six (6) cents per gallon on all gasoline, combinations thereof, or substitute therefor, sold or consigned, used, shipped or distributed for the purpose of sale within the State. That every oil company subject to the tax provided for in this

Act shall, on or before the 20th day of each month, and every month, make out and file with the South Carolina Tax Commission a return under oath, in such form as may be prescribed by said South Carolina Tax Commission showing the number of gallons of gasoline, combinations thereof, or substitutes therefor, which have been sold or consigned, used, shipped or distributed for the purpose of sale within the State during the previous month and shall at the same time remit to the State Treasurer the amount of the tax provided by this Act. And every such oil company shall keep a record, or records, showing all purchases and dispositions of all gasoline, combinations thereof, or substitutes therefor, and such records shall be at all times subject to inspection by any agent of the South Carolina Tax Commission or the Department of Agriculture, Commerce and Industry."

"Section 2. Distribution of Proceeds.—The license tax of six (6) cents per gallon on gasoline as herein levied and provided for shall be distributed as follows:

"Five (5c) cents on each gallon shall be turned over to the State Highway Department for the purposes of said Department and one (1c) cent per gallon shall be distributed to the Counties of the State to be used exclusively for the construction and maintenance of County roads, and the distribution of the one (1c) cent per gallon license tax among the Counties shall be on the same basis and by the same method as now provided by law for the distribution [fol. 8] of the two (2c) cents gasoline tax formerly or heretofore distributed among the Counties."

"Section 3. Use of Portion Allotted to State Highway Department.—Out of the five (5c) cents gasoline tax herein allocated for the purposes of the State Highway Department, together with other current income or other funds of said Department, the State Highway Commission or Department shall make payments or reimbursements as follows:

"(a) The appraised value of any hard surfaced roads, or concrete bridges connecting with other States, now in the State Highway System constructed by any County or Counties either before or after the passage of Act. No. 731, of the Acts of 1924, shall be reimbursed or paid to such County, reimbursements to be made on the basis of

valuation for hard surfaced roads provided for in Section 3 of Act No. 731 of the Acts of 1924. Such reimbursements shall be made to such county in annual installments over the period of years ending in 1943. All unpaid obligations of the State Highway Commission coming under the provisions of this clause shall bear interest at the rate of four and one-half per centum per annum, payable semi-annually, or if any County shall have issued bonds for said paving, then interest shall be paid by said Highway Commission to such County at the rate borne by the bond of said county, such interest to be paid semi-annually. No payments shall be made under this clause for roads constructed under reimbursements agreements referred to in clause (c) of this Section.

"(b) The amounts which the State Highway Commission has or shall have by agreements made with Counties or highway or bridge districts since the passage of Act No. 731 of the Acts of 1924, or hereafter made, agreed to pay as reimbursement for constructing State highways, or for advancing money for said purposes shall be reimbursed or paid to such County or highway or bridge districts. All unpaid obligations of the State Highway Commission coming under the provisions of this clause shall bear interest [fol. 9] at the rate borne by any bonds or other obligations issued by Counties or highway or bridge districts for the purpose of obtaining funds advanced and/or used for the construction of State highways. In any case where any County or highway or bridge district has advanced money to the State Highway Commission from sources other than from the sale of bonds or notes bearing a fixed rate of interest, the interest paid on such amounts shall be at the rate of four and one-half per centum per annum, payable annually. Payments of interest required by this Section to be made at the rate borne by bonds or other obligations shall be made at or before the times when the interest on said bonds or other obligations fall due. The interest required to be paid to Counties or highway or bridge districts under the provisions of this Section shall be computed from the date of approval of this Act by the Governor:

"(c) In any case where the portion of the gasoline tax which is required by laws enacted prior to this Act to be

distributed to Counties has been lawfully pledged in whole or in part for, or is required by law to be applied, in whole or in part, to the payment of the principal and/or interest of any bonds or other obligations, the State Highway Commission shall pay said principal and/or interest at or before the times when said principal and/or interest become due. The payments and reimbursements required by this Section shall have priority over any other payments authorized or required by law to be made out of the gasoline tax or other current income of the State Highway Department."

"Section 4. In Lieu of Former Tax.—The license tax of six (6) cents per gallon on gasoline as herein levied and provided for shall be in lieu of the gasoline tax of five (5) cents per gallon heretofore levied, assessed and collected by law. All provisions of law now relating to the collection of the gasoline tax are hereby re-enacted."

* * * * * * *

"Approved the 16th day of March A. D. 1929."

[fol. 10] 14. That Section 4 of the Act above set forth provides among other things that all provisions of law now relating to the collection of the gasoline tax are hereby re-enacted. That Section 10 of Act No. 34 of 1929 provides that upon failure of any oil company or dealer to pay the tax above mentioned, said oil company or dealer shall be guilty of a misdemeanor and upon conviction thereof subject to heavy penalties in the form of fines and imprisonment.

15. That under the provisions of the said Acts and amendments thereto above referred to the defendants as members of the South Carolina Tax Commission are charged with and exercise the duty of collection the said tax and enforcing the same.

16. That complainant is now and for a long time prior hereto has been buying gasoline at Greenville, S. C., and Spartanburg, S. C., and since April 1, 1931, at Charleston and Florence, S. C., for the purpose of refueling its airplanes at said points; that said gasoline bought at said cities is used by complainant only in its said interstate

operations and none of said gasoline is diverted to be used by others or for local or intrastate use.

17. Complainant has been and is now paying over and above the price per gallon for said gasoline an additional amount of six (6) cents per gallon on all of said gasoline delivered in South Carolina as a tax enacted by the defendants and the State of South Carolina; that complainant pays said tax to the oil companies or dealers from which complainant purchases said gasoline, and that said oil companies or dealers deliver the said tax of six (6) cents per gallon monthly to the defendants as members of the South Carolina Tax Commission. That said oil companies and dealers in collecting said tax from complainant and delivering it to the defendants are acting as defendants' agents and agents of the State of South Carolina.

18. That said tax is not an ad valorem or property tax, but is a license or excise tax.

19. That the said Acts and amendments thereto imposing said tax are revenue Acts only and were not enacted [fol. 11] as police regulations and were not intended to promote morality, health or public security and order.

20. That Act No. 101 of 1929 (South Carolina Acts 1929, pages 105, 106), requires oil companies and dealers in gasoline to file bond with the South Carolina Tax Commission conditioned upon payment by all oil companies and dealers of all gasoline taxes due under the Acts and amendments thereto above mentioned.

21. Complainant alleges on information and belief that the defendants would criminally prosecute any producer, refiner or distributor of gasoline for the sale or delivery of gasoline to complainant for the aforesaid use without collecting and remitting said tax at the rate of six (6) cents per gallon, and it is now impossible for complainant to obtain in South Carolina from any producer, refiner or distributor or from any other source any gasoline for use in its interstate commerce and business without the defendants exacting and collecting the said six (6) cents per gallon tax thereon.

22. That complainant cannot take delivery of said gasoline at a point outside the State of South Carolina and

privately bring same into the State of South Carolina by tank car or otherwise for its own use, because it is deterred and prevented from so doing because of Act No. 833 of 1930 (South Carolina Acts, 1930, pages 1390-1392), which Act provides that any gasoline brought into the State of South Carolina for private use shall after being stored within this state for a period of twenty-four hours or more be subjected to the payment of a license tax of six (6) cents per gallon, and said Act further provides heavy penalties for failure to comply with the terms thereof.

23. That the said tax amounts to approximately thirty-five (35%) per cent of the untaxed cost of said gasoline, and that said tax is a tax on the consumption and use of said gasoline.

24. The amount of said tax increases in constant and direct proportion to the amount of said interstate business transacted by complainant.

25. That said tax is designed, levied and collected as a charge for the use and upkeep of the public roads, high- [fol. 12] ways and bridges of the State of South Carolina by motor vehicles. That five (5) cents of the six (6) cents per gallon tax is used by the Highway Commission of the State of South Carolina for the constructions, maintenance and upkeep of public roads in the State Highway System of South Carolina; that the remaining one (1) cent of the six (6) cents per gallon tax is distributed to the various Counties of the State of South Carolina to be used exclusively for the construction and maintenance of County roads.

26. That complainant has not, does not and does not intend to use the public roads, highways, bridges or County roads in the State of South Carolina, that the airplanes of complainant travel entirely in the air and off the earth, and there is no rational relationship between the said gasoline tax as imposed on complainant and the purposes of same, nor are any benefits derived by complainant from the State of South Carolina therefor.

27. That a part of the gasoline necessarily taken in its airplanes at Greenville and/or Spartanburg and/or Florence and/or Charleston, S. C., by complainant is consumed

in and over the State of South Carolina, and a portion thereof is required to generate power with which to propel said airplanes from the boundaries of the State of South Carolina to the nearest adequate and proper refueling points outside of the State of South Carolina; that it is not feasible or possible to refuel said airplanes at the points where they cross the boundaries of the State of South Carolina in entering or leaving said State.

28. That the said Act and the amendments thereto is unconstitutional, illegal and void insofar as same applies or is applied to complainant or its said business or operations, for the reason that the same directly burdens and interferes with interstate commerce, and particularly for the reason that the said Act and the defendants' administration thereof directly burdens and interferes with the said interstate commerce and business of complainant in transporting and carrying mail and/or passengers and/or freight and/or express by airplane; and the said Act and the said administration thereof is unconstitutional, il- [fol. 13] legal and void because it conflicts with, offends against and is in violation of Clause 3 of Section 8 of Article 1 of the Constitution of the United States, which provides as follows:

"Powers of Congress—The Congress shall have power to: (3) Commerce. To regulate commerce with foreign nations and among the several States, and within the Indian tribes."

in that the said Act and its said administration by the defendants purports to impose and levy, and does impose and levy an occupation, license or excise tax on gasoline delivered to or purchased, taken on for refueling or used by complainant as fuel in the State of South Carolina to propel said airplanes flying in interstate commerce between said State and neighboring States and across said State between other States, thus enacting said tax as the price of the privilege of using an instrumentality of interstate commerce, and thus invading the exclusive power of Congress to regulate commerce between the several states.

29. That the proceeds derived from said tax are used exclusively to build and maintain public roads, highways and bridges in the State of South Carolina, and is and

was intended to place the burden of road and bridge building and maintenance on those using motor vehicles on said roads and bridges; that complainant does not use any of said roads or bridges for the operation of its airplanes and therefore the burden of said tax on complainant and its business bears no rational relationship to the purpose of said taxation, or any benefits received by complainant from the State, and there is no rational relationship between the business of complainant and the purpose of said tax, and insofar as said tax applies or is applied to gasoline used by complainant as fuel in its said airplanes in interstate commerce the same is in violation of Clause 3, Section 8, Article 1 of the Constitution of the United States.

30. That the said Act is in violation of the Fourteenth Amendment of the Constitution of the United States in that the said tax levied and imposed against complainant de- [fol. 14] prives complainant of its property without due process of law, for the reason that said Act imposes the collection of a tax for the construction, maintenance and upkeep of public highways, roads and bridges in the State of South Carolina, and complainant does not use in any way or derive any benefits from any of the public highways, roads or bridges of the State of South Carolina in the maintenance, operation or propulsion of its said airplanes in said interstate commerce.

31. That complainant has paid said tax on all gasoline used for refueling its said airplanes in South Carolina in order that it might use said airplanes in said interstate commerce. It has been and is impossible for complainant to purchase gasoline within the State of South Carolina without the payment of said tax because of the heavy penalties and punishments provided against any refiner, producer or dealer who should sell or attempt to sell gasoline to complainant without collecting said tax.

32. That there is no provision in the said Act imposing said gasoline tax for the recovery of money paid to the defendants and the State of South Carolina as gasoline tax, even though said tax may not have been owed by the taxpayer.

33. Complainant alleges that unless the defendants are enjoined and restrained from enforcing or attempting to

enforce the said Act and amendments thereto imposing the said gasoline tax that complainant and all others similarly situated will sustain irreparable loss, damage and injury in each of the following particulars:

"(a) That the complainant and all others similarly situated will be compelled to pay taxes imposed pursuant to an invalid and unconstitutional enactment and pursuant to an illegal and unconstitutional administration of said enactment.

"(b) That unless the injunctive relief herein sought be granted the said interstate business of complainant will daily be burdened, interfered with and damaged.

"(c) That the further enforcement of said Act and the amendments thereto will have the effect of injuring or impairing all lawful business in which complainant and [fol. 15] others similarly situated are engaged, and in which they have a right to engage, which right is guaranteed by the Constitution of the United States."

Inasmuch, therefore, as the complainant is without any adequate remedy at law and can obtain relief only in a Court of Equity, complainant prays:

"1. That writs of subpoena be issued to each of said defendants requiring each of them to answer this complaint fully and truthfully.

"2. That each and all of the defendants and their successors in office be herewith temporarily restrained and be enjoined after final hearing from enforcing against complainant and all others similarly situated any of the provisions of the said Act and amendments thereto, and from collecting or taking any steps to enforce the provisions of said Act for the gasoline which will be used as aforesaid.

"3. That said Act and amendments thereto be construed as not applying to complainant or its said business or operations or the incidents thereof, or the gasoline that it consumes aforesaid.

"4. That said Act be declared unconstitutional in its enforcement and attempted and threatened enforcement and administration against complainant and its business

and operations and the incidents thereof and the said gasoline it uses.

"5. That this Honorable Court set a date as early as may be convenient for interlocutory hearing hereon before three Federal Judges as provided by law.

"6. That other persons, corporations, partnerships or associations similarly situated at their request may be permitted to intervene in this suit.

"7. That complainant have such other and further relief as in the premises it may appear to the Court complainant is entitled to."

Cuthell, White, Hotchkiss & Mills, Benet, Shand & McGowan, Solicitors for Complainant.

[fols. 16-39] *Duly sworn to by Harold A. Elliott. Jurat omitted in printing.*

[fol. 40] IN UNITED STATES DISTRICT COURT

TEMPORARY RESTRAINING ORDER—Filed May 8, 1931

This matter comes before me on the verified bill of complaint of Eastern Air Transport, Inc., and accompanying affidavits attacking the constitutionality of an Act of the General Assembly of the State of South Carolina, approved February 25, 1922 (South Carolina Acts, 1922, pages 835-38), and amendments thereto, imposing a tax upon the business of selling, consigning, using, shipping or distributing for the purpose of sale within the State of South Carolina any gasoline, or any substitute therefor or combination thereof.

It appears that due notice was given to the defendants that the complainant would so appear and apply for a temporary restraining order restraining the South Carolina Tax Commission from enforcing, or attempting to enforce, against the complainants any of the provisions of the Acts and amendments in question.

After hearing arguments from counsel for complainant and defendants and it appearing that irreparable loss and damage will result to the complainant unless a temporary restraining order is granted restraining the enforcement,

operation and execution of the said statute against the complainant pending the convening of a Court composed of three Judges, as in such cases is provided by the statutes of the United States.

Now, therefore, it is ordered, decreed and adjudged that the defendants, and each of them, their successors in office, their agents, servants, employees and attorneys, be and they are hereby enjoined and restrained from enforcing, or at- [fols. 41 & 42] tempting to enforce, directly or indirectly, against the complainant any of the provisions of the said Act and amendments thereto, and from collecting, or attempting to collect, the tax of six cents per gallon on gasoline purchased by complainant within the State of South Carolina for use in its airplanes engaged in interstate commerce, pending a decision by the Court composed of three Judges as required by the statutes of the United States.

It is further ordered that the complainant herein shall within five days from the date of the entry of this order file with the Clerk of this Court a bond, to be approved by the Clerk, in the sum of five thousand dollars, conditioned upon the payment of such costs and damages as may be incurred or suffered by the issuance of this order, if it shall finally be decided that such restraining order should not have been issued.

J. Lyles Glenn, Judge U. S. District Court, Eastern District of South Carolina.

May 7, 1931.

[fol. 43] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF J. C. KING—Filed May 8, 1931

STATE OF SOUTH CAROLINA,
County of Richland:

Personally appeared before me J. C. King, who, being duly sworn, says that he is branch manager of the South Carolina branch of Standard Oil Company of New Jersey. That South Carolina branch of said company includes all of the State of South Carolina.

That on account of the South Carolina gasoline tax the sum of six cents per gallon is added to the price of all gaso-

line sold by Standard Oil Company of New Jersey in South Carolina, except gasoline sold in tank car lots, on which the tax is paid by the purchaser under the terms of the South Carolina Statute, or to the United States Government. The said sum of six cents per gallon tax is paid by the purchasers of gasoline to Standard Oil Company of New Jersey and is remitted by Standard Oil Company of New Jersey to South Carolina Tax Commission.

That Standard Oil Company of New Jersey would not sell gasoline in South Carolina to Eastern Air Transport, Inc., or to any other purchasers, unless the additional sum of six cents per gallon was paid to cover the South Carolina gasoline tax.

J. C. King.

Sworn to before me this 5th day of June, 1931. Geo. L. Dick, Notary Public for S. C. (Seal.)

[fol. 44] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF H. A. ELLIOTT

STATE OF NEW YORK,
County of Kings, ss:

H. A. Elliott, being first duly sworn, deposes and says as follows:

I am the Vice President of Eastern Air Transport, Inc., the above complainant, and have been since July 1929. As such Vice President I am thoroughly familiar with all matters and details relating to the operations of said Eastern Air Transport, Inc. and this affidavit is made in my capacity as Vice President aforesaid.

Eastern Air Transport, Inc. is a corporation organized and existing under the laws of the State of Delaware, as evidenced by the certified copy of its Articles of Incorporation and amendments hereto annexed as Exhibit A. It is not, and never has been, incorporated in the State of South Carolina. Its principal office is at No. 100 Tenth Street, in the City of Wilmington, State of Delaware.

The matter in dispute in this proceeding exceeds, exclusive of costs and interest, the sum or value of $3,000.00,

in that the additional amount paid to Standard Oil Company of New Jersey on gasoline purchased from it by Eastern Air Transport, to wit: the sum of 6 cents on each gallon purchased, which said sum represents the amount of the tax imposed by the laws of the State of South Carolina, for the [fol. 45] twelve months' period ending March 31, 1931 is the sum of $3254.88. Since April 1st, the company has been operating an additional service into and over the State of South Carolina, so that the amount which will be paid over subsequent periods of twelve months will exceed said sum. As a carrier of United States mail in interstate transportation, as hereinafter set out, the amount paid to Eastern Air Transport, Inc. exceeds the sum of $100,000.00 a month, while the receipts from its passenger operations, from the fares paid by the passengers carried in interstate commerce, is in excess of the sum of $15,000.00 a month.

Eastern Air Transport, Inc. operates (weather permitting) into and out of the State of South Carolina each day eight airplanes carrying passengers and United States mail, the latter pursuant to the provisions of a contract with the Post Office Department of the United States, a copy whereof was filed with the bill of complaint in this cause, and to which reference is hereby made. Its operations begin at Newark Airport, Newark, New Jersey, and continue through and over the states of New Jersey, Pennsylvania, Delaware, Maryland, the District of Columbia, Virginia, North Carolina, South Carolina, Georgia and Florida, with its terminus at Miami. Its planes make stops in the State of South Carolina at the cities of Spartanburg, Greenville, Florence and Charleston. It sells no tickets and carries no passengers solely between any of the aforesaid cities in the State of South Carolina. It does carry passengers from outside of the State of South Carolina to the cities aforesaid, and it does carry passengers from those cities to points outside of the State of South Carolina. It carries United States mail from points outside of the State of South Carolina to the cities aforesaid, and receives United States mail at those cities and carries the same to points outside of the State of South Carolina. In a few instances it has, at the direction of the Post Office Department, carried one or more pouches of mail between Spartanburg and Greenville or between Charleston and Florence, but in each and every instance, such mail was carried on an airplane whose journey began

outside of the State of South Carolina and which merely passed through said state, ending its journey at some point outside of the said State of South Carolina. But in all such [fol. 46] instances the mail so carried was transported along with a much larger quantity of mail originating outside of the State of South Carolina and destined to a point in that State or to points in other states, and the same gasoline was used to provide the motive power for the plane carrying the mail pouches between the cities aforesaid and the mail pouches being carried in interstate transportation. It would be absolutely impossible in a practicable way, or even by a mathematical formula, to segregate the gasoline used to provide the motive power for carrying one or two mail pouches between points within the state and the gasoline used to provide the motive power to carry mail pouches in interstate shipments when, as in every instance, all such mail pouches were carried by the same airplane at the same time. Eastern Air Transport, Inc. does not operate any airplanes on journeys commencing and ending within the State of South Carolina.

The motive power of the airplanes is derived from internal combustion engines, in which gasoline is used for fuel which gasoline is of a special type designed solely for use in aircraft engines, and is not suitable for use in automobiles. In its operations, it is necessary for Eastern Air Transport, Inc. to refuel its airplanes regularly at Spartanburg and Florence, and occasionally at Greenville and Charleston. Its operations cannot be carried on without such refuelings. All of the gasoline so used at the points aforesaid is purchased from the Standard Oil Company of New Jersey, pursuant to contract. Eastern Air Transport, Inc. pays to said Standard Oil Company of New Jersey a certain price per gallon for gasoline, and in addition, pays to it a tax of 6 cents per gallon on all gasoline so purchased as evidenced by one of said Standard Oil Company's invoices hereto annexed, marked Exhibit B, which said invoice is similar in form to all other invoices. Eastern Air Transport has never been able to purchase gasoline in the State of South Carolina without the payment of the tax thereon, and on information and belief, this deponent avers that it is impossible to buy from said Standard Oil Company of New Jersey, or any other distributor of gasoline in the

State of South Carolina, without paying to such distributor, in addition to the price of the gasoline, the additional sum [fol. 47] of 6 cents per gallon thereon, representing the amount of the tax imposed by the State of South Carolina. On information and belief, this deponent avers that the amounts paid by it of 6 cents per gallon on each gallon of gasoline purchased by it within the State of South Carolina, and shown on the invoices rendered to it by said Standard Oil Company of New Jersey, are remitted by said company to the tax authorities of the State of South Carolina. Deponent further says on information and belief that unless said sum of 6 cents per gallon is paid on each gallon of gasoline purchased by it in the State of South Carolina, it would be unable to purchase gasoline from said Standard Oil Company of New Jersey or any other distributor.

It is the purpose and intent of Eastern Air Transport, Inc. to continue in the future its business in the same manner as it is now carried on, that is to say, the carriage of passengers and mail over the route commencing at Newark, New Jersey Airport, through the states aforesaid, including the State of South Carolina, and terminating in the State of Florida, and unless the collection of said tax of 6 cents per gallon is enjoined, Eastern Air Transport, Inc. will be compelled to pay the same on all gasoline purchased by it in the State of South Carolina.

In the operations of Eastern Air Transport, Inc. it would not be possible for it to purchase gasoline outside of the State of South Carolina, bring the same into said state, and use all of said gasoline to refuel its planes within 24 hours after the same is brought into the state.

In the operations of the airplanes of Eastern Air Transport, Inc. it does not use and does not intend to use the public roads, highways, bridges, or county roads in the State of South Carolina, as its airplanes travel entirely in the air and off the earth, except when ending or beginning a flight within the said state and when so ending or beginning a flight, the airplane comes to rest or starts from landing fields owned and operated by the municipalities of the cities above referred to, and neither in landing nor taking off from said fields do the airplanes of Eastern Air Transport, Inc. use the public roads, highways, bridges or county roads in the State of South Carolina.

[fols. 48-62] A portion of the gasoline taken into the airplanes of Eastern Air Transport, Inc. at Spartanburg and/or Greenville and/or Florence and/or Charleston is consumed in the motors in said airplanes in and over the State of South Carolina, and another portion is used to generate power to propel said airplanes from and over the boundaries of said State of South Carolina to the nearest available refueling point outside of said State, it not being possible or feasible to refuel said airplanes at the point where they cross the boundaries of South Carolina in entering or leaving said State.

And further the deponent saieth not.

H. A. Elliott.

Subscribed and sworn to before me this 11th day of June, 1931. Edward E. Skinner, Notary Public.

[fol. 63] IN UNITED STATES DISTRICT COURT

ANSWER—Filed May 25, 1931

The joint and several answer of the defendants South Carolina Tax Commission and W. G. Query, J. P. Derham and Frank C. Robinson, as members of South Carolina Tax Commission, to the bill of complaint of the plaintiff above named respectfully shows:

1. Defendants have no knowledge as to the allegations contained in paragraph one (1) of the bill of complaint.

2. Defendants admit the allegations contained in paragraph two (2) of the bill of complaint.

3. Defendants deny so much of paragraph three (3) of the bill of complaint as alleges that this action arises under the laws of the United States and the provisions of the Constitution of the United States and the Amendments [fol. 64] thereto. Defendants have not knowledge sufficient to form a belief as to whether complainant is a citizen, resident and inhabitant of a state other than the State of South Carolina.

Further answering paragraph three (3), defendants have not knowledge or information sufficient to form a belief as to whether the matter in dispute exceeds, exclusive of

costs and interest, the sum or value of Three Thousand ($3,000.00) Dollars and, therefore, deny the same.

4. Defendants deny the allegations contained in paragraph four (4) of the bill of complaint.

5. Defendants deny so much of paragraph five (5) of the bill of complaint as alleges that it is being subjected to said unconstitutional, illegal and void taxation and allege that they have not knowledge or information sufficient to form a belief as to whether the value of the right of complainant to do and transact interstate business and commerc in and through the State of South Carolina is in excess of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs.

6. Defendants deny the allegations contained in paragraph six (6) of the bill of complaint.

7. Defendants have no knowledge as to the allegations contained in paragraph seven (7) of the bill of complaint.

8. Defendants have no knowledge as to the allegations contained in paragraph — (8) of the bill of complaint.

[fol. 65] 9. Defendants have no knowledge as to the allegations contained in paragraph nine (9) of the bill of complaint.

10. Defendants have no knowledge as to the allegations contained in paragraph ten (10) of the bill of complaint.

11. Defendants have no knowledge as to the allegations contained in paragraph eleven (11) of the bill of complaint.

12. Defendants deny the allegations contained in paragraph twelve (12) of the bill of complaint.

13. Defendants admit the allegations contained in paragraph thirteen (13) of the bill of complaint.

14. Defendants admit the allegations contained in paragraph fourteen (14) of the bill of complaint.

15. Defendants admit the allegations contained in paragraph fifteen (15) of the bill of complaint.

16. Defendants have no knowledge as to the allegations contained in paragraph sixteen (16) of the bill of complaint.

17. Defendants deny the allegations contained in paragraph seventeen (17) of the bill of complaint.

[fol. 66] 18. Defendants admit the allegations contained in paragraph eighteen (18) of the bill of complaint.

19. Defendants admit the allegations contained in paragraph nineteen (19) of the bill of complaint.

20. Defendants admit the allegations contained in paragraph twenty (20) of the bill of complaint.

21. Defendants deny the allegations contained in paragraph twenty-one (21) of the bill of complaint.

22. Defendants deny the allegations contained in paragraph twenty-two (22) of the bill of complaint.

23. Defendants deny the allegations contained in paragraph twenty-three (23) of the bill of complaint.

24. Defendants deny the allegations contained in paragraph twenty-four (24) of the bill of complaint.

25. Defendants admit the allegations contained in paragraph twenty-five (25) of the bill of complaint.

26. Defendants deny the allegations contained in paragraph twenty-six (26) of the bill of complaint.

[fol. 67] 27. Defendants have no knowledge as to the allegations contained in paragraph twenty-seven (27) of the bill of complaint.

28. Defendants deny the allegations contained in paragraph twenty-eight (28) of the bill of complaint.

29. Defendants admit so much of paragraph twenty-nine (29) of the bill of complaint as alleges that the revenues derived from said tax are used exclusively to build and maintain public highways, but they deny that said tax was intended to place the burden of road and bridge building maintenance on those exclusively using motor vehicles on said roads and bridges. Defendants deny each and every other allegation contained in paragraph twenty-nine (29) of said bill of complaint.

30. Defendants deny the allegations contained in paragraph thirty (30) of the bill of complaint.

31. Defendants deny the allegations contained in paragraph thirty-one (31) of the bill of complaint.

32. Defendants admit so much of paragraph thirty-two (32) of the bill of complaint as alleges that there is no provision in said Act imposing said gasoline tax for the recovery of taxes paid even though said tax may not have been owed by the taxpayer, but these defendants allege that complainant has paid no tax under the provisions of the Act [fol. 68] referred to in the bill of complaint and defendants have not demanded the payment of any tax from it.

33. Defendants deny the allegations contained in paragraph thirty-three (33) of the bill of complaint

For a first further separate and distinct defense defendants allege that the Act of the Legislature of South Carolina referred to in the bill of complaint has no application to complainant; that neither South Carolina Tax Commission nor any of the other defendants officially, individually or collectively have construed said Act as applying to complainant; they have made no demand upon complainant for the payment of any tax whatsoever, have made no threats against complainant of prosecuting it, or taking any other action whatsoever against it; that none of said defendants have made any claim or demand against complainant whatsoever and they do not intend to and will not make any claim for any tax penalty against complainant under the provisions of the Act of the Legislature referred to in the bill of complaint. That complainant has paid no tax to South Carolina Tax Commission nor to any member thereof, nor to any agent or employee thereof, under the provisions of the Act set forth in the bill of complaint, nor under any other Act of the Legislature of South Carolina.

[fol. 69] For a second further, separate and distinct defense in point of law arising upon the face of the bill of complaint herein, defendants say that the facts alleged in said bill of complaint are insufficient to constitute a valid cause of action in equity.

For a third further, separate and distinct defense it appears from the face of said bill of complaint that the supposed grounds of jurisdiction of a federal court are frivolous with no facts alleged sufficient to show or make

it appear that any real substantial federal question is involved.

For a fourth further, separate and distinct defense in point of law arising upon the face of the bill of complaint herein, defendants say that for the purposes of this suit South Carolina Tax Commission is in fact and in law the State of South Carolina and this Court is without jurisdiction to entertain this suit so far as this defendant is concerned as provided by Article XI of Amendments to the Federal Constitution.

Wherefore, defendants deny that the complainant is entitled to the relief prayed for in the bill of complaint or any part thereof, or to any other relief against these defendants, and pray that the bill of complaint be dismissed with costs.

John M. Daniel, Attorney General; J. Fraser Lyon, Attorneys for Defendants.

[fol. 70] *Duly sworn to by W. G. Query. Jurat omitted in printing.*

[fol. 71] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF W. G. QUERY

Personally appeared W. G. Query who first being duly sworn, deposes and says:

That he is a member and Chairman of South Carolina Tax Commission and is familiar with the records of the office of the Tax Commission relating to the assessment and collection of the tax imposed upon dealers in gasoline for the privilege of selling the same, and with the records showing the licenses issued to dealers in gasoline by South Carolina Tax Commission.

That Eastern Air Transport, Inc., has not applied for, nor has it been issued a license to deal in gasoline or otherwise dispose of gasoline within the State of South Carolina.

That Eastern Air Transport, Inc., has paid no tax whatsoever to South Carolina Tax Commission and that any allegation in the bill of complaint herein which may allege [fol. 72] directly or by inference that complainant has paid any tax to the Tax Commission or to any agent of the Tax

Commission for the privilege of using gasoline in its aeroplanes or otherwise is without foundation in either law or in fact.

W. G. Query.

Sworn to before me this 21st day of May, 1931. Mrs. G. W. Jones, Notary Public for South Carolina.

[fol. 73] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF W. G. QUERY IN REPLY TO AFFIDAVITS OF HAROLD W. BEISLEY, J. C. KING AND H. A. ELLIOTT

STATE OF SOUTH CAROLINA,
County of Richland:

W. G. Query, being first duly sworn, deposes and says as follows:

I am Chairman of South Carolina Tax Commission and am familiar with the administration of the law and collection of the tax on corporations and persons for the privilege of dealing in gasoline in this State, that is the business of selling, consigning, using, shipping or distributing for the purpose of sale within this State of any gasoline or substitute therefor, etc., being Act No. 102, approved March 16, 1929.

I am also familiar with Act No. 101, approved 4th day of March, 1929, whereby gasoline dealers are required to file [fol. 74] bond and secure license from South Caroline Tax Commission to engage in such business.

Also an Act approved the 14th day of May, 1931, amendatory to the last above named Act.

Attached to this affidavit and marked "Exhibit A," is a copy of the application of Standard Oil Company of New Jersey to South Carolina Tax Commission for license to deal in gasoline, etc.

Attached hereto is a letter of Standard Oil Company of New Jersey signed J. C. King, Manager, in relation to application for license to deal in gasoline, and marked "Exhibit A-1."

Attached hereto is copy of letter of W. G. Query, Chairman South Carolina Tax Commission addressed to Stand-

ard Oil Company of New Jersey in regard to issuance of license, marked "Exhibit A-2."

Attached hereto is copy of gasoline Dealers' license issued to Standard Oil Company of New Jersey by South Carolina Tax Commission, marked "Exhibit A-3."

Eastern Air Transport, Inc., has made no application to South Carolina Tax Commission for a gasoline dealers' license in this State and does not pay and is not under any law of South Carolina required to pay to South Carolina Tax Commission any tax on gasoline or any tax on account of being a dealer in gasoline or any substitute therefor; that there is no statute or Act of the Legislature requiring Eastern Air Transport, Inc., or any other vehicle bringing into this State gasoline in the tanks of its motor propelled vehicle used for the propulsion of such vehicle, and South Carolina Tax Commission has never claimed or demanded the payment of any tax from Eastern Air Transport, Inc., for or [fol. 75] on account of any gasoline that it may have brought into this State in its aeroplanes nor for any it may have purchased in this State and carried out of said State in interstate commerce, or otherwise.

Standard Oil Company of New Jersey is not an agent or representative in any capacity of South Carolina Tax Commission for the collection of any tax whatsoever, or for any other purpose. It is licensed to deal in gasoline and is required to pay to South Carolina Tax Commission a graduated license tax based upon the number of gallons of gasoline sold and used by it at the rate of six cents per gallon, and the obligation to pay said tax is in no wise influenced or dependent upon whether it absorbs the tax or adds the amount equal to the tax to the price of each gallon of gasoline it may sell.

If Standard Oil Company of New Jersey adds six cents per gallon to the price of its gasoline it charges Eastern Air Transport, Inc., it is a matter of private contract and agreement between said Companies and has no relation to nor effect upon the liability of Standard Oil Company of New Jersey to pay a license tax to South Carolina Tax Commission at the rate of six cents per gallon. Standard Oil Company of New Jersey is one of the largest tax payers in South Carolina. In addition to the taxes paid for the privilege of dealing in gasoline, its taxes amount to several hundred

thousand dollars per year. These taxes consist of income tax, property tax, corporation license tax and documentary stamp tax. South Carolina Tax Commission has no knowledge whether Standard Oil Company of New Jersey increases the price of gasoline it sells within this State by the amount of these latter taxes it is required to pay, but whether it absorbs such taxes or whether it increases the price of [fol. 76] gasoline to Eastern Air Transport, Inc. and its other customers sufficiently to pay this tax, is a matter of no legal concern to South Carolina Tax Commission, as Standard Oil Company of New Jersey is required to pay these taxes just as it is required to pay the gasoline dealers license tax.

In case Standard Oil Company of New Jersey, or other person or corporation in like situation, sells a tank car lot of gasoline to a dealer who resells the same within the State of South Carolina, Standard Oil Company of New Jersey is not required to pay a tax on account of such sale, but the seller or distributor who purchases gasoline under such circumstances when it or he sells or uses the same, is required to pay the tax thereon at the rate of six cents per gallon for the privilege of selling said gasoline.

Attached hereto is a copy of a letter dated May 27, 1931, signed by J. C. King, Manager Standard Oil Company of New Jersey, addressed to W. G. Query, Chairman of South Carolina Tax Commission, and marked "Exhibit B."

Attached hereto is a copy of a letter of W. G. Query, Chairman South Carolina Tax Commission, addressed to J. C. King, Manager Standard Oil Company of New Jersey, dated June 2, in reply to the last above letter, and marked "Exhibit B-1."

That Standard Oil Company of New Jersey, as required by law, makes monthly report to South Carolina Tax Commission showing the number of gallons of gasoline it sold, used, etc., during the previous month, and showing the amount of tax it is required to pay therefor.

[fol. 77] Attached hereto and marked Exhibits "C", "D", "E", "F", and "G", are copies of monthly reports of Standard Oil Company of New Jersey to South Carolina Tax Commission filed in 1931, together with copies of letters of J. C. King, Manager of Standard Oil Company of New Jersey transmitting the same.

The original files containing the above records will be offered to the Court for its inspection, if it should so desire.

The original monthly reports of Standard Oil Company of New Jersey for the year 1930 will be tendered the Court for its inspection if it should desire to examine same. The reports for the year 1930 are of the same form and substance as the reports filed in 1931.

That South Carolina Tax Commission, nor any of its members have any knowledge as to whom Standard Oil Company of New Jersey sells gasoline within the State of South Carolina, or elsewhere, except that on some of the monthly reports made to South Carolina Tax Commission there is a list of tank car lots sold to corporations and persons who are dealers in gasoline in South Carolina and who resell the same, and also to such sales as are made to agencies of the United States Government.

Dealers in gasoline in South Carolina who sell gasoline to water craft, dry cleaners, to textile plants for finishing purposes, to those who use stationary engines, no matter whether such stationary engines are used to operate cotton gins, saw mills, rock crushing, concrete mixing, mining, thrashing machines, grist mills, small town lighting plants, or otherwise, and to those who use farm machinery, none of which are operated on the highways of this State, such seller [fols. 78-102] of gasoline is nevertheless required and does pay the tax for the privilege of selling such gasoline so used at the rate of six cents per gallon. The only exemption allowed to a seller of gasoline in this State is when a sale is made to an agency of the Federal Government, and it makes no difference if the buyer of gasoline operates his automobile or truck entirely within an incorporated city or town, which city or town receives no benefit from the revenue derived from the tax on dealers in gasoline.

W. G. Query.

Sworn to before me this 13 day of June, 1931. Mrs. T. W. Jones, Notary Public for South Carolina. Seal. (L. S.)

[fol. 103] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF B. R. STROUP

STATE OF SOUTH CAROLINA,
County of Richland:

B. R. Stroup, being first duly sworn, deposes and says as follows:

I am Assistant Maintenance Engineer of the South Carolina State Highway Department and am familiar with the highways, roads and streets leading to the airports of Charleston, Florence, Greenville and Spartanburg, which airports are being used by planes of the Eastern Air Transport, Inc.

That the airport at Charleston, S. C., is located approximately eleven miles from the post office in Charleston, and that the streets, highways and roads between the post office and the airport were built and are being maintained as follows:

Approximately 3 miles of paved city streets within the city limits of Charleston, built and maintained by the City of Charleston; approximately 7 miles of U. S. Highway #17 paved and maintained by the South Carolina State [fol. 104] Highway Department; and approximately 1 mile of earth road leading from U. S. Highway #17 to the airport, built and being maintained by the County of Charleston.

That the airport at Florence, S. C., is located approximately 2½ miles from the post office in Florence and that the streets, highways and roads between the post office and the airport were built and are being maintained as follows:

Approximately 1 mile of paved city streets, built and maintained by the City of Florence; approximately 1 mile of U. S. Highway #17 paved and maintained by the South Carolina State Highway Department; and a connecting link between the airport and U. S. Route #17 of sand-clay type, approximately ½ mile long, built and maintained by the City of Florence with the assistance of the County of Florence.

That the airport at Greenville, S. C., is located approximately 4 miles from the post office at Greenville and that the streets, highways and roads between the post office and

the airport were built and are being maintained as follows:

Approximately 1 mile of paved streets built and maintained by the City of Greenville; approximately 2 miles of paved U. S. Highway #76 built and maintained by the South Carolina State Highway Department; and a connecting link approximately 1 mile long between the airport and U. S. Route #76, of top-soil construction, built and maintained by the County of Greenville.

That the airport at Spartanburg, S. C., is located approximately 4½ miles from the City of Spartanburg between a County paved highway and State Route #10, which is a paved highway, and that the streets, highways and roads between the above mentioned points were built and are being maintained as follows:

(1) Over State Route #10.—Approximately 1½ miles of paved city streets, built and maintained by the City of Spartanburg; approximately 2 miles of paved State Route [fol. 105] #10, built and maintained by the South Carolina State Highway Department; and approximately 1 mile of bituminous surfacing or surface treatment, which is a connecting link between the airport and State Route #10, built and being maintained by the County of Spartanburg.

(2) Over County Paved Highway.—Approximately 3 miles built by the U. S. Army and the City of Spartanburg, and now being maintained by City and County of Spartanburg; approximately ½ mile of paved highway built by the South Carolina State Highway Department, and when the State Highway was re-located this section was turned over to the County of Spartanburg for maintenance; and approximately ½ mile of bituminous surfacing or surface treated highway, a connecting link between the airport and the County highway, built and being maintained by the County of Spartanburg.

B. R. Stroup.

Sworn to before me this 13th day of June, 1931.
Margaret Burton, Notary Public for South Carolina. (L. S.)

[fol. 106] IN UNITED STATES DISTRICT COURT

ORDER CALLING THREE JUDGE COURT—Filed May 28, 1931

In this suit application is made for an interlocutory injunction, enjoining the South Carolina Tax Commission, a State agency of the State of South Carolina, from the enforcement of one of the State Tax Laws. The grounds involve the constitutionality under the Federal Constitution of the state statute in so far as it affects the Complainants. From the record it is clear that this case should be heard by a Court of three Judges, convened under Section 266 of the Judicial Code, (Title 28 U. S. C. A. Section 380).

It is therefore ordered that the Honorable John J. Parker, United States Circuit Judge of the 4th Judicial Circuit, and the Honorable Ernest F. Cochran, United States District Judge of the Eastern District of South Carolina be and they are hereby called to the assistance of the undersigned, Honorable J. Lyles Glenn, and the Court as thus constituted be the Court to hear and determine this case.

Ordered further that the Honorable John J. Parker and Ernest F. Cochran be forthwith furnished with a copy of this order.

A separate order is to be filed fixing the time and place for hearing.

J. Lyles Glenn, U. S. District Judge.

Rock Hill, S. C., May 28th, 1931.

[fol. 107] IN UNITED STATES DISTRICT COURT

OPINION—Filed Sept. 4, 1931

PARKER, Circuit Judge:

This is a suit to restrain the collection of the South Carolina gasoline tax with respect to gasoline sold to complainant, Eastern Air Transport, Inc., on the ground that as to such gasoline the tax imposes a burden upon interstate commerce in violation of the Commerce Clause of the Constitution of the United States. (Constitution, Article 1, paragraph 8, Clause 3.) An interlocutory injunction restraining the collection of the tax is asked, and a court of

three judges has been convened pursuant to section 266 of the Judicial Code.

Complainant is a Delaware corporation operating air transport lines in interstate commerce across the state of South Carolina. Its planes stop at Greenville, Spartanburg, Florence and Charleston in that state, but do not carry freight or passengers between these cities, practically its entire business in South Carolina being interstate in character. At these points, however, it purchases gasoline from the Standard Oil Company for the use of its planes; and that company charges complainant six cents per gallon more for same that it otherwise would because it is required by the state of South Carolina to pay a dealer's license tax of that amount. The suit is instituted against the members of the South Carolina Tax Commission to enjoin them from collecting this tax from the Standard Oil Company with respect to the gasoline sold complainant, on the theory that, as complainant is engaged in interstate commerce and uses the gasoline purchased in carrying on same, the tax is a burden on interstate commerce which may not be imposed by the state. Although complainant is not required to pay the tax itself, the burden of same falls upon it, and the [fol. 108] doctrine laid down in Station WBT Inc. v. Poulnot, 46 Fed. (2d) 671 is invoked as sustaining the right of complainant to maintain the suit. There is no question but that the jurisdictional amount is involved.

The South Carolina statute imposing the tax is Act No. 102, approved March 16, 1929, S. C. Acts 1929 pp. 107-112. The pertinent portion thereof is as follows:

"That every oil company, person, firm or corporation doing domestic or intrastate business within this State, and engaging in the business of selling, consigning, using, shipping, or distributing for the purpose of sale within this State, any gasoline or any substitute therefor, or combination thereof, for the privilege of carrying on such business shall be subject to the payment of a license tax, which tax shall be measured by and graduated in accordance with the volume of sales of such oil company within the State. Every such oil company shall pay to the State an amount of money equal to six (6) cents per gallon on all gasoline, combination thereof, or substitutes therefor, sold or consigned, used,

shipped or distributed for the purpose of sale within the State."

It may be well to note that the act approved April 4, 1930 (Acts 1930 pp. 1390-1392) imposing a tax of six cents per gallon on all persons importing gasoline into the state which is "intended to be stored or used for consumption in the state" has no application to the case at bar. Complainant is not importing or storing gasoline for use in the state of South Carolina and is in no wise affected by that statute, whether it be constitutional or not. It is affected by the gasoline tax statutes only with respect to its purchases from the Standard Oil Company, and, as to these, only because that company is taxed on the basis of its sales and passes the tax on to its customers through an increase in the price charged them. The sole question in the case, therefore, is the validity of the tax imposed by the act of 1929 upon the Standard Oil Company when measured by its sales of gasoline which the purchaser intends to use and does use in [fol. 109] carrying on interstate commerce. We think that the tax is valid.

We attach no importance to the fact that the tax is described in the statute as a privilege or license tax; for where such tax is measured by sales, it is in effect a sales tax, whatever it may be called. Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 222. And, although not a property tax within the meaning of the South Carolina Constitution, but an excise tax (Gregg Dy-ing Co. v. Tax Commission, — S. C. —, — S. E. —), it must be treated as in effect a tax upon the property sold for determining questions arising under the Federal Constitution. Kehrer v. Stewart 197 U. S. 60; Welton v. Missouri, 91 U. S. 275; Brown v. Maryland, 12 Wheat. 425. But the rule is that, the right of a state — tax property within its borders or transactions therein occurring is practically unlimited, except that it may not tax interstate commerce or burden such commerce by taxing the instrumentalities used in carrying it on or violate other constitutional provisions not here material. The sale, being completed within the state of South Carolina, is, of course, not a transaction in interstate commerce. The question in the case, then, comes to this: whether at the time of the sale, which is the transaction by which the tax is measured, the gasoline which is the subject of the sale can be regarded as

in instrumentality of such commerce. We think this question must be answered in the negative. The gasoline assumes the character of such an instrumentality only because of the use made of it after the sale is complete.

The question arises whether the fact that at the time of the sale, the purchaser intends that the gasoline shall be used in carrying on interstate commerce and buys it for that purpose, affects the right of the state to tax the sale. [fol. 110] The answer to this is that the criterion by which the right of the state is to be judged is not the intention of the purchaser but the status of the property at the time of the transaction. As said by Mr. Justice McKenna in Heisler v. Thomas Colliery Co., 260 U. S. 245, 159, "If the possibility, or, indeed, certainty of exportation of a product or article from a state determines it to be in interstate commerce before the commencement of its movement from the state, it would seem to follow that it is in such commerce from the instant of its growth or production, and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other states, at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof', wool yet unshorn, and coal yet unmined, because they are varying percentages destined for and surely to be exported to states other than those of their production."

In Oliver Iron Co. v. Lord, 262 U. S. 172, the state of Minnesota had imposed a tax on the business of mining iron ore measured by a percentage of the value of the ore mined or produced. Substantially all of the ore when mined was loaded on cars and shipped into other states to satisfy existing contracts. In holding that the tax on production was not a burden on interstate commerce though the ore was destined for transportation in such commerce even before it was mined, the court, speaking through Mr. Justice Van Devanter, said:

[fol. 111] "The ore does not enter interstate commerce until after the mining is done, and the tax is imposed only

in respect to the mining. No discrimination against interstate commerce is involved. The tax may indirectly and incidentally affect such commerce, just as any taxation or railroad and telegraph lines does, but this is not a forbidden burden or interference."

The same holding has been made with respect to the production tax on gas (Hope Natural Gas Co. v. Hall 274 U. S. 284); a tax on coal prepared and "ready for shipment or market" and destined for a market in other states (Heisler v. Thomas Colliery Co., supra); and a manufacturing tax upon goods sold in interstate commerce (American Mfg. Co. v. St. Louis 250 U. S. 459). A state has the same right to tax sales that it has to tax the production of gas, the mining of coal or the manufacture of merchandise; and, if destination of the product for use or shipment in interstate commerce does not affect the power of the state to tax in these cases, there is no reason why the intention that property sold should be used in carrying on interstate commerce should affect the right of the state to tax its sale. No one, we think, would contend that a railroad operating a coal mine could escape the production tax on coal because it was intended to use the coal in carrying on interstate commerce; and we see no reason why a sales tax on coal or on oil would not be equally valid.

The leading case dealing with the right of the state to tax property intended for interstate commerce is Coe v. Errol 116 U. S. 517. In that case it was held that goods intended for transportation to another state are liable to taxation as a part of the general mass of property of the state in which they are situate until actually started in transportation to the state of their destination. The criterion applied in that and later cases (see Crescent Oil [fol. 112] Co. v. Mississippi 257 U. S. 129; Heisler v. Thomas Colliery Co., supra) is thus stated by Mr. Justice Bradley: "Such goods do not cease to be part of the general mass of property in the state, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject. It seems to us untenable to hold that a crop or a herd is exempt from

taxation merely because it is, by its owner, intended for exportation." While that case dealt with property intended for transportation in interstate commerce, it is clear that the same principle is applicable in the case of property intended for use in interstate commerce and that such property is withdrawn from the taxing power of the state only when such use is actually begun.

A different question would be presented if the taxing statute made discrimination between ordinary sales of gasoline and sales of gasoline intended for use or transportation in interstate commerce. Such discrimination would constitute an attempt on the part of the state to burden interstate commerce which is not permissable. Cf. Welton v. Missouri, supra, 91 U. S. 277. But there is no discrimination in the tax here. Sales of gasoline intended for use in interstate commerce are taxed in the same way and at the same rate as other sales. The tax is a mere revenue measure imposed upon purely intrastate transactions and there is no attempt whatever to discriminate against the gasoline which is intended for subsequent use in interstate commerce.

The case of Nelson v. Kentucky 279 U. S. 245, upon which complainant particularly relies, is not in point. In that case a statute of Kentucky taxed the use of gasoline within [fol. 113] the state. The state officials brought action to recover the tax from the operators of a ferry boat who purchased gasoline in Illinois and used same in operating an interstate ferry boat. The question of the right of Kentucky to tax sales of gasoline intended for use in interstate commerce was not involved. The question was the right of that state to tax the use in interstate commerce or gasoline purchased in another state. It was held that the state was without power to tax the use of an instrumentality of interstate commerce, which is manifestly a very different question from that involved in the right of the state to tax the sale within its borders of an article designed by the purchaser for use in interstate commerce. As said by Mr. Justice Sutherland in Hart Refineries v. Harmon 278 U. S. 499, 503, "the difference between an excise tax based on sales and one based on use of property is obvious and substantial."

We have carefully examined the cases of U. S. Airways v. Shaw 43 Fed. (2d) 148 and Mid-Continent Air Express Corp. v. Lujan 47 Fed. (2d) 266, upon which complainant

relies. In so far as these cases deny to a state the right to impose a tax on sales occurring within its borders because the purchaser intends to use the property purchased in carrying on interstate commerce, we think that they press the doctrine of the Helson case too far; and, while we have great respect for the courts which rendered these decisions, we cannot follow them in that holding. It appears, however, that the statutes dealt with in these cases taxed the use of gasoline within the state and not merely the sale; and the right to tax the use in interstate commerce, as we have shown above, is a very different matter from the right to tax the sale before the use in interstate commerce begins. In so far, therefore, as these cases deal with the right to tax the use of gasoline in interstate commerce, they decide [fol. 114] a question which is not before this court.

It is said, however, that the Supreme Court of South Carolina, in the recent case of Gregg Dying Co. v. Tax Commission — S. C. —, S. E. —, has construed the gasoline tax statutes of South Carolina as intended to impose a tax on the ultimate consumer, and that hence the statute in question is to be treated as a tax on the use. We do not think that this conclusion follows. The Gregg case passed upon the validity of the act of 1930 which imposed a tax upon gasoline brought into the state and intended to be "stored or used for consumption" therein, and, as we have seen, that statute is not here involved, nor is the portion of the former statute taxing use. It is true that the court adverted to the obvious shifting of the sales tax to the ultimate consumer and said that it was the purpose of the legislature in passing the act of 1930 that all consumers should pay the gallonage tax of six cents; but the fact remains that, whether shifted or not, the tax imposed by the act of 1929 so far as measured by sales is a tax on sales occurring within the state, which the state has a right to tax. Even though the legislature may have known that the sales tax would be shifted to the ultimate consumer by increase in price and may have passed the tax intending this result to follow, this did not affect its power to tax sales as shown above, nor does it exempt sales from taxation merely because the purchaser may intend that the property purchased be used in interstate commerce. As said by Mr. Justice McKenna in Heisler v. Thomas Colliery Co., supra, 260 U. S. 245, 259, "whether any statute or action

of a state impinges upon interstate commerce depends upon the statute or action, not upon what is said about it or the [fol. 115] motive which impelled it."

Complainant relies upon the decisions in Panhandle Oil Co. v. Mississippi, supra, 277 U. S. 218, and Indian Motorcycle Co. v. U. S. — U. S. —, 51 S. C. Ct. Rep. 601, and argues that, because the state may not collect a sale tax upon a sale made to an agency of the federal government, nor the latter collect such tax upon a sale made to an agency of the state, such tax may not be collected from a sale made to one engaged in interstate commerce where the property is to be used in such commerce. The conclusion does not follow. In the case of a sale to the federal government or a state, it is the character of one of the parties to the transaction which exempts it from taxation. In the case of a purchase for use in interstate commerce, the character of the parties has nothing to do with the matter. It is the use in interstate commerce which exempts the property from taxation at the hands of the state; and, as heretofore shown, this use cannot arise until after the sale is complete. The basis of the decisions relating to the purchases by the state and federal governments is thus stated by Mr. Justice Butler in the Panhandle Oil case:

"The right of the United States to make such purchases is derived from the Constitution. The petitioner's right to make sales to the United States was not given by the state and does not depend on state laws; it results from the authority of the national government under the Constitution to choose its own means and sources of supply. While Mississippi may impose charges upon petitioner for the privilege of carrying on trade that is subject to the power of the state, it may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes."

And in the Indian Motorcycle case, Mr. Justice Van Devanter stated the basis of the rule as follows:

"Here the tax is laid directly on the sale to a governmental state agency of an article purchased for governmental purposes. The sale and purchase constitute a sin-
[fol. 116] gle transaction, in which the purchaser is an essential participant. Without that participation the sale

could not be effected. Thus, the transaction falls, within the class which the United States cannot tax consistently with the constitutional principle."

It is argued in support of the tax that, even if it be construed as a tax upon an instrumentality of interstate commerce, it should be sustained under the decisions of Clark vs. Poor 274 U. S. 554, and Kane vs. New Jersey, 242 U. S. 160. It is said that the gasoline tax is devoted to the maintenance of the roads in South Carolina, and that, although the planes of complainant do not use the roads, the maintenance of the public roads is important to the carrying on of complainant's business, as such roads must be maintained to its air ports for the benefit of its passengers and, as the upkeep of such roads leading to the cities near which its air ports are located facilitates its business and increases its patronage. Much can be said in favor of this position. See Boeing Air Transport, Inc. vs. Edelman — Fed. (2d) —. We base our conclusion that the tax is valid, however, on the fact that the sale by which the tax is measured is not a transaction in interstate commerce, and that the gasoline sold does not become an instrumentality of such commerce until after the sale is complete.

For the reasons stated, we think that the interlocutory injunction prayed for should be denied.

Interlocutory Injunction Denied.

We concur:

John J. Parker, U. S. Circuit Judge. Ernest F. Cochran, U. S. District Judge. J. Lyles Glenn, U. S. District Judge.

[fol. 117] IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed September 4, 1931.

In the above entitled cause, the Court, after considering the pleadings and affidavits and hearing argument of counsel on motion for interlocutory injunction, finds the following facts:

1. That complainant is a corporation duly created and existing under and by virtue of the laws of the State of Delaware, and for the purposes of this suit is to be deemed a citizen of the State of Delaware.

2. That the defendant W. G. Query, J. P. Derham and Frank C. Robinson are citizens and residents of the state of South Carolina, and are members of the Tax Commission of said state.

3. That the amount in controversy in the suit exclusive of interest and costs, exceeds the sum or value of $3,000.00.

4. That the Legislature of South Carolina, at its session for the year 1929, enacted a revenue statute approved March 16, 1929, known as Act No. 102, the provision of which pertinent to this case is as follows:

"That every oil company, person, firm or corporation doing domestic or intrastate business within this State, and engaging in the business of selling, consigning, using, ship-
[fol. 118] ping, or distributing for the purpose of sale within this State, and gasoline or any substitute therefor, or combination thereof, for the privilege of carrying on such business shall be subject to the payment of a license tax, which tax shall be measured by and graduated in accordance with the volume of sales or such oil company within the State. Every such oil company shall pay to the State an amount of money equal to six (6) cents per gallon on all gasoline, combination thereof, or substitute therefor, sold or consigned, used, shipped or distributed for the purpose of sale within the State."

5. That complainant operates in interstate commerce air transport lines across the state of South Carolina; that its planes operated on said lines make regular stops at Greenville, Spartanburg, Florence and Charleston in said State, but do not carry freight or passengers between these cities, and practically the entire business of complainant in South Carolina is interstate in character.

6. That at Greenville, Spartanburg, Florence and Charleston, in the State of South Carolina, complainant purchases gasoline from the Standard Oil Company for the use of its planes which are being used in interstate commerce; that the Standard Oil Company adds to the price

of the gasoline which it sells to complainant the amount of the gasoline tax which it is required to pay by the Tax Commission of the state of South Carolina under the statute aforesaid; that complainant, because of the collection of the said tax measured by the sales made to it as aforesaid, is required to pay to the Standard Oil Company six cents per gallon more for the gasoline purchased than it would be required to pay if the said tax were not exacted on said sales; and that the amount which complainant is required to pay to the Standard Oil Company for gasoline purchased in South Carolina as aforesaid, over and above the amount which it would pay if the said tax were not exacted, amounts to $5,000,00 per year or more.

7. That the moneys derived by the state of South Carolina from the gasoline tax aforesaid are used exclusively [fol. 119] to maintain public roads, highways and bridges in the state of South Carolina; that said roads, highways and bridges are not used by the planes of complainant, but the maintenance of the public roads of the state is important to the carrying on of complainant's business, such roads must be maintained to its air ports for the benefit of its passengers and as the upkeep of such roads leading to the cities near which its air ports are located facilitates its business and increases its patronage.

8. That complainant has instituted this suit to enjoin the defendants, Tax Commission of the State of South Carolina, from collecting from the Standard Oil Company the tax aforesaid on the sales of gasoline made by the Standard Oil Company to complainant; that if the defendants are not enjoined from collecting said tax they will collect same from the Standard Oil Company and that company will increase by the amount of the tax collected from it the price of gasoline which it sells to complainant, so that the burden of the tax will eventually fall upon complainant; and that complainant has no remedy at law by which it may recover from the state of South Carolina the tax so paid.

Conclusions of Law

Upon the foregoing findings of fact the Court concludes as a matter of law:

1. That the statute aforesaid is valid and constitutional.

2. That the collection of the tax from the Standard Oil Company measured by sales made to complainant of gasoline for use in its planes is not a burden upon interstate commerce, as such gasoline does not become an instrumentality in interstate commerce until the use in such commerce begins, which is after the sale to complainant is complete.

[fol. 120] 3. That the State of South Carolina has the right to collect the tax imposed by the statute upon sales of gasoline made and completed within the state, even though the purchaser may intend to use the gasoline in carrying on interstate commerce.

4. That complainant is not entitled to the interlocutory injunction prayed.

This 31st day of August, 1931.

John J. Parker, United States Circuit Judge, Fourth Judicial Circuit. Ernest F. Cochran, United States District Judge, Eastern District of South Carolina. J. Lyles Glenn, United States District Judge for the State of South Carolina.

[fol. 121] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

EASTERN AIR TRANSPORT, INC., Complainant,

versus

SOUTH CAROLINA TAX COMMISSION and W. G. QUERY, J. P. DERHAM, and FRANK C. ROBINSON, as Members of South Carolina Tax Commission, Defendants

DECREE DENYING INTERLOCUTORY INJUNCTION—Filed September 4, 1931

This cause coming on to be heard on application of complainant for interlocutory injunction before the undersigned constituting a court of three judges convened pursuant to section 266 of the Judicial Code, and being heard upon the bill, answer, affidavits and arguments of counsel; and the

Court having made and filed its findings of fact and conclusions of law as required by the equity rule of the Supreme Court, and being of opinion for the reasons therein stated, and more fully set forth in the written opinion filed herewith, that complainant is not entitled to the interlocutory injunction prayed:

Now, therefore, it is ordered and decreed that the interlocutory injunction prayed for be, and the same is hereby denied; and it is further ordered that the temporary restraining order heretofore granted be dissolved, provided, however, that the said temporary restraining order shall be continued in force for thirty days from this date for the purpose of preserving the status quo until the complainant shall have had opportunity to determine whether it will [fol. 122] appeal to the Supreme Court and take such steps as may be necessary for the preservation of its rights pending appeal.

And this cause is retained for further orders.

This 31st day of August, 1931.

John J. Parker, United States Circuit Judge, Fourth Judicial Circuit. Ernest F. Cochran, United States District Judge, Eastern District of South Carolina. J. Lyles Glenn, United States District Judge for the State of South Carolina.

[fol. 123] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed September 28, 1931

To the Honorable John J. Parker, Circuit Judge; Ernest F. Cochran and J. Lyles Glenn, District Judges, acting as a District Court pursuant to Section 266 as amended of the Judicial Code of the United States.

The above named complainant feeling aggrieved by the decree rendered and entered in the above entitled cause on the 31st day of August, 1931, does hereby appeal from said decree to the Supreme Court of the United States for the reasons set forth in the Assignment of Errors filed herewith, and it prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme

Court of the United States sitting at Washington, District of Columbia, under the rules of such Court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made. And it further prays that, upon giving bond in such amount as this Court may require, this Court pending an appeal to the United States Supreme Court will enjoin and restrain the South Carolina Tax Commission and the members thereof from enforcing, or seeking to enforce, as to complainant the provisions of the act in question, to wit: S. C. Acts 1929, pp. 107-112, and from collecting, or seeking [fol. 124] to collect any tax upon gasoline purchased by complainant in the State of South Carolina for use in its interstate air transportation.

Respectfully, Cuthell, White, Hotchkiss & Mills, Benet, Shand & McGowan, Attorneys for Complainant.

[fol. 125] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed September 28, 1931

Now comes the complainant in the above entitled cause and files the following assignment of erors upon which it will rely upon its prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on the 31st day of August, 1931.

I

That the United States District Court for the Eastern District of South Carolina erred in failing to find from the uncontradicted evidence that complainant could not operate its airplanes and conduct its interstate passenger and freight business without purchasing gasoline in the State of South Carolina, complainant being compelled to make stops within said State by virtue of its contract with the United States for the carriage of mails into and out of said State of South Carolina.

II

That the United States District Court for the Eastern District of South Carolina erred in its finding of fact numbered 7, wherein it found that "the upkeep of such roads leading to the cities near which its air ports are located facilitates [fol. 126] its business and increases its patronage", there being no evidence in the record to sustain such finding.

III

That the United States District Court for the Eastern District of South Carolina erred in its conclusions of law numbered 1, to the effect that the Statute of the State of South Caroline involved in this controversy "is valid and constitutional", in that the evidence showed that said Statute in its application to complainant imposed a burden upon an instrumentality of interstate commerce.

IV

That the United States District Court for the Eastern District of South Carolina erred in its conclusion of law numbered 2, wherein it held that: "the collection of the tax from the Standard Oil Company measured by sales made to complainant of gasoline for use in its planes is not a burden upon interstate commerce, as such gasoline does not become an instrumentality in interstate commerce until the use in such commerce begins, which is after the sale to complainant is complete," in that the tax in question was shown to be a tax upon the use of said gasoline in interstate commerce.

V

That the United States District Court for the Eastern District of South Carolina erred in its conclusion of law numbered 3 as follows: "That the State of South Carolina has the right to collect the tax imposed by the Statute upon sales of gasoline made and completed within the State, even though the purchaser may intend to use the gasoline in carrying on interstate commerce," in that the tax in question was shown to be a tax upon the use of said gasoline in interstate commerce, and the tax imposed thereon to be a burden upon an instrumentality of interstate commerce.

[fol. 127]

VI

That the United States District Court for the Eastern District of South Carolina erred in its conclusion of law numbered 4, "that complainant is not entitled to the interlocutory injunction prayed," because the act, against the enforcement of which the interlocutory injunction was sought, imposes a burden upon an instrumentality of interstate commerce.

VII

That the United States District Court for the Eastern District of South Carolina erred in failing to find that the act of the State of South Carolina, approved March 16, 1929, S. C. Acts 1929, pp. 107-112 (the pertinent portion of which is set out in the opinion of the Court), which imposes a tax of 6 cents per gallon on all gasoline sold or consigned, used, shipped or distributed within the State of South Carolina resulted in a burden upon the business of interstate commerce conducted and carried on by complainant, and hence said law is unconstitutional, null and void as to this complainant's interstate air transportation business since it violates Article 1, Paragraph 8, Clause 3, of the Constitution of the United States.

VIII

That the United States District Court for the Eastern District of South Carolina erred in declining and refusing to grant to the complainant an interlocutory injunction against the South Carolina Tax Commission restraining them from the collection of the tax imposed by the laws of the State of South Carolina upon gasoline purchased by complainant and used by it in the conduct of its interstate airplane freight and passenger business.

IX

That the United States District Court for the Eastern District of South Carolina erred in failing to find that the [fol. 128] tax imposed by the act in question is a tax upon the use of gasoline in the State of South Carolina.

Wherefore the complainant prays that the said decree be reversed and that said District Court for the Eastern Dis-

trict of South Carolina be ordered to enter a decree reversing its decision in this cause.

Cuthell, White, Hotchkiss & Mills, Benet, Shand & McGowan, Attorneys for Complainant.

September 24, 1931.

[fol. 129] IN UNITED STATES DISTRICT COURT

EASTERN AIR TRANSPORT, INC., Complainant,

vs.

SOUTH CAROLINA TAX COMMISSION and W. G. QUERY, J. P. DEBHAM, and FRANK C. ROBINSON, as Members of South Carolina Tax Commission, Defendants

ORDER ALLOWING APPEAL AND RESTRAINING DEFENDANTS PENDING APPEAL—Filed September 28, 1931.

The complainant herein having petitioned to this Court praying that it be allowed an appeal to the Supreme Court of the United States for the reasons set forth in the Assignment of Errors filed herewith, and praying also that pending such appeal to the United States Supreme Court that the defendants be enjoined and restrained from enforcing, or attempting to enforce, as to complainant, the terms of a certain Act of the General Assembly of the State of South Carolina, South Carolina Acts 1929, pages 107-112.

Now on motion of solicitors for complainant, and with the consent of J. Fraser Lyon, Esq., solicitor for the defendants,

It is ordered:

That the appeal herein to the United States Supreme Court is allowed as prayed for.

It is further ordered that pending such appeal and until final order herein, the defendants, and each of them, their successors in office, their agents, servants, employees and attorneys be and they are hereby enjoined and restrained from enforcing, or attempting to enforce, directly or indirectly, against the Complainant, any of the provisions of the said act above mentioned, to wit, South Carolina Acts 1929, pages 107-112, and from collecting or attempting

[fols. 130-136] to collect tax of six cents per gallon on gasoline purchased by complainant within the State of South Carolina for use in its airplanes engaged in interstate commerce.

It is further ordered that complainant shall within five days from the date of the entry of this order file with the Clerk of this Court a bond to be approved by the Clerk in the sum of Five Thousand ($5,000.00) Dollars, conditioned upon the payment of such costs and damages as may be incurred or suffered by the issuance of this order and because of the appeal herein allowed.

This Sept. 25, 1931.

John J. Parker, Circuit Judge; Ernest F. Cochran, District Judge; J. Lyles Glenn, District Judge, Sitting as the District Court Pursuant to Section 266 as Amended of the Judicial Code of the United States.

I consent to the above order and to the amount of the bond as therein provided and that said order may be signed by the Judges of this Court individually and not in open Court.

(Sd.) J. Fraser Lyon, Attorney for South Carolina Tax Commission, and W. G. Query, J. P. Derham, and Frank C. Robinson, as Members of South Carolina Tax Commission.

Sept. 24, 1931.

[fols. 137-139] Citation, in usual form, showing service on J. Fraser Lyon, Filed October 7, 1931, omitted in printing.

[fols. 140 & 141] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation of Parts of Record to be Printed—Filed Nov. 11, 1931

Comes now the appellant in the above-entitled cause, and states that the points upon which it intends to rely in this Honorable Court in this case are as follows:

(See paragraphs III to IX of assignments of error.)

[fol. 142] Appellant designates the following parts of the record as necessary for the consideration of this case, the same only to be printed:

	Record page
1. Bill of Complaint	3
2. Temporary Restraining Order	40
3. Affidavit of H. A. Elliott	44
4. Answer	63
5. Affidavit of W. G. Query, attached to Answer	71-73-103
6. Order calling Three-Judge Court	106
7. Opinion	107
8. Findings of Fact and Conclusions of Law	117
9. Decree Denying Interlocutory Injunction	121
10. Petition for Appeal	123
11. Assignment of Errors	125
12. Order Allowing Appeal and Restraining Defendants Pending Appeal	129
13. Citation	137
14. Acceptance of Service of Citation	138

Note: Since the points to be relied upon are paragraphs III to IX, both inclusive, of the Assignment of Errors, it will be unnecessary to print both the points relied on and the Assignment of Errors, so it is suggested that as the latter includes all of the former, the latter only be printed.

William H. White, Attorneys for Appellant.

November 9th, 1931.

Service of a copy of the foregoing accepted this 9th day of November, 1931.

J. Fraser Lyon, Attorney for Appellees.

[fol. 143] [File endorsement omitted.]

[fols. 144 & 145] IN SUPREME COURT OF THE UNITED STATES

STATEMENT BY APPELLEES OF ADDITIONAL PARTS OF THE RECORD TO BE PRINTED—Filed Nov. 21, 1931

South Carolina Tax Commission, W. G. Query, J. P. Derham and Frank C. Robinson, as members of South

Carolina Tax Commission, the appellees in the above entitled cause, hereby designate the following parts of the record which they think material in addition to the parts of the record set forth in the statement filed by appellant herein, pursuant to paragraph 9 of the Supreme Court Rule #13, viz:

1. Affidavit of J. C. King, page 43,
2. Affidavit of W. G. Query in reply to other affidavits, page 73, omitting all exhibits attached to said affidavit from "A" to "G", inclusive,
3. Affidavit of B. R. Stroup, page 103.

J. Fraser Lyon, Attorney for Appellees.

November 19, 1931.

Service of a copy of the foregoing accepted this 19th day of November, 1931.

Cuthell, White, Hotchkiss & Mills, Benet, Shand & McGowan, Attorneys for Appellant.

[fol. 146] [File endorsement omitted.]

File No. 36,318. E. South Carolina, D. C. U. S. Term No. 504. Eastern Air Transport, Inc., Appellant, vs. South Carolina Tax Commission and W. G. Query, J. P. Derhan and Frank C. Robinson, etc. Filed November 4, 1931. File No. 36,318.

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CHARLES

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 504

EASTERN AIR TRANSPORT, INC., COMPLAINANT, APPELLANT,

vs.

SOUTH CAROLINA TAX COMMISSION AND W. G. QUERY, J. P. DERHAM AND FRANK C. ROBINSON, AS MEMBERS OF SOUTH CAROLINA TAX COMMISSION, RESPONDENTS, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF SOUTH CAROLINA.

STATEMENT AS TO JURISDICTION ON APPEAL.

WILLIAM H. WHITE, JR.,
Washington, D. C.
CHRISTIE BENET,
W. C. McGOWAN,
Columbia, S. C.
Counsel for Appellant.

INDEX.

Subject Index.

	Page
a. Statutory provisions sustaining jurisdiction	1
b. Date of judgment and date of application for appeal	3
c. Nature of case and ruling below	3
d. Cases believed to sustain jurisdiction	6

Cases Cited in Support of Jurisdiction.

Clark v. Poor, 274 U. S., 554	6
Helson v. Kentucky, 279 U. S., 245	6
In re Buder, 271 U. S., 461, 464	6
Looney v. Crane and Co., 245 U. S., 178	6
Louisville, etc., Railroad Co. v. Garrett, 231 U. S., 298	6
McCulloch v. Maryland, 4 Wheat., 316	6
Pan Handle Oil Co. v. Mississippi, 277 U. S., 218	6
Shaffer v. Carter, 252 U. S., 37, 44	7
Smith v. Wilson, 273 U. S., 388, 391	7
Texas Company v. Brown, 258 U. S., 466	7
Van Dyke v. Geary, 244 U. S., 39	7

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 504

EASTERN AIR TRANSPORT, INC., APPELLANT,

vs.

SOUTH CAROLINA TAX COMMISSION AND W. G. QUERY, J. P. DERHAM AND FRANK C. ROBINSON, AS MEMBERS OF SOUTH CAROLINA TAX COMMISSION, RESPONDENTS, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF SOUTH CAROLINA.

To the Honorable, the Justices of the Court aforesaid:

The appellant, in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represents:

(a) Statutory Provisions Sustaining Jurisdiction.

This is an appeal from a "Statutory Three Judge Court" for the Eastern District of South Carolina,

wherein appellant sought an interlocutory injunction restraining the South Carolina Tax Commission from collecting a tax upon gasoline purchased by it in South Carolina and used by it exclusively in interstate air transportation, upon the ground that the South Carolina law imposing said tax is unconstitutional because it violates the provisions of Clause 3 of Section 8 of Article I, of the Constitution of the United States. See Bill of Complaint, Record, pages 3 *et seq.**

Section 266 of the Judicial Code as amended (being Act of Congress June 18, 1910, 36 Stat. 557, as amended by 36 Stat. 1162, 37 Stat. 1013, 43 Stat. 938) provides that no interlocutory injunction suspending or restraining the enforcement of any statute of a State shall be granted, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to, and heard and determined by, three judges, which provision of the statute was followed in this case. See Order calling Three Judge Court, page 106; Opinion of Court, page 107; Decree denying Interlocutory Injunction, page 121.

The same section of the Judicial Code provides that "An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunc-

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*References to the Record are to the pages of the certified unprinted Record, prepared by the Clerk of the United States District Court for the Eastern District of South Carolina, and on file with the Clerk of this Court. The Record has not yet been printed.

tion in such case." See Notice, page 3; Opinion of Court, pages 107, 116.

(b) Date of Judgment and Date of Application for Appeal.

The judgment sought to be reviewed was entered on the 4th of September, 1931.

The petition for appeal was presented September 28th, 1931, and allowed September 28th, 1931.

(c) Nature of Case and Ruling Below.

An Act of the General Assembly of the State of South Carolina, approved February 23, 1922 (South Carolina Acts, 1922, pages 835-838), as amended by Act No. 146 of 1923, Act No. 731 of 1924, Act No. 34 of 1925, and Act No. 102 of 1929 (South Carolina Acts, 1929, pages 107-112), provides for the payment of a tax of six cents per gallon upon all gasoline sold within the State. (For further details, see quotations therefrom, paragraph "13" Bill of Complaint, pages 3, 6-9, Record.)

Eastern Air Transport, Inc., a Delaware corporation, is engaged in the business of operating airplanes carrying United States mail and passengers between Newark, New Jersey Airport and points in the State of Florida. In the course of such journeys, its airplanes stop at Spartanburg and Florence in the State of South Carolina. Such airplanes are propelled by internal combustion engines, in which gasoline is used to produce the motive power. Because of the present-day construction of airplanes, it is not possible for

them to take on enough fuel at the Newark Airport to carry them to Florida, and it becomes necessary to refuel or replenish the supply of gasoline at intermediate points, such refueling being done at Spartanburg and Florence in the State of South Carolina.

Eastern Air Transport is engaged, in the State of South Carolina, only in interstate business, that is to say, none of its planes make a flight solely within the State of South Carolina; all of its planes start from a point without the State, and end their journey at points without the State. The stops at Spartanburg and Florence are for the purpose of delivering and/or taking on United States mail and passengers and for refueling, as aforesaid. The passengers and mail taken on at these points are destined for points outside of the State, while the passengers and mail delivered at Spartanburg and Florence come from a point without the State.

In order to refuel its planes at Spartanburg and Florence, both within the State of South Carolina, the company purchases from Standard Oil Company of New Jersey, gasoline at both of those points, which gasoline is intended to be used and is used only in interstate journeys.

In addition to the cost of every gallon of gasoline purchased from Standard Oil Company, the latter exacts from Eastern Air Transport an additional sum of six cents per gallon, which it in turn remits to the State tax authorities of South Carolina, pursuant to the provisions of the South Carolina law.

In the court below the plaintiff sought a preliminary injunction to restrain the enforcement of the aforesaid

State statute and pressed its application to a hearing. The points at issue, which disclose the nature of the case, may be stated as follows:

The exaction from Eastern Air Transport, engaged exclusively in the conduct of interstate airplane transportation, of a tax of six cents per gallon on every gallon of gasoline purchased within the State of South Carolina for use in such interstate commerce, which tax is imposed pursuant to the statutes of said State, results in imposing upon the interstate business of Eastern Air Transport, Inc., such a burden as to make the taxing law of South Carolina unconstitutional, in so far as the laws of South Carolina seek to impose such tax upon gasoline purchased and used exclusively in interstate commerce, because of the interstate commerce provisions of the Constitution of the United States. See Bill of Complaint, pages 3, 12; Opinion of Court, pages 107, 108, 109; Findings of Fact and Conclusions of Law, pages 117, 119.

The court below held that the South Carolina law in question is valid and constitutional and that the collection of the tax imposed by said law, under the circumstances of this case, is not a burden upon interstate commerce; that the State of South Carolina may lawfully impose and collect such tax; and that Eastern Air Transport was not entitled to the interlocutory injunction prayed for. See Conclusions of Law, pages 117, 119, 120. The court thereupon ordered and decreed that the temporary restraining order theretofore granted be dissolved, but that the said temporary restraining order should continue in force for thirty days until the complainant should have an opportunity

to preserve and perfect its rights pending appeal. See Decree Denying Interlocutory Injunction, pages 121, 122.

(d) Cases Believed to Sustain Jurisdiction.

Since McCulloch *v.* Maryland, 4 Wheat. 316, this Court has not, in a proper case, hesitated to declare unconstitutional a statute of a State if it appeared that such statute conflicted with the Constitution of the United States, or any of the powers exercised thereunder, or guarantees thereof. The present action attacks the law of South Carolina upon the ground that it imposes a burden upon interstate commerce, the regulation whereof is reserved to the United States by the Constitution. On numerous occasions this Court has exercised this power with respect to taxing statutes of a State, in cases coming to it from the specially constituted District Court of Three Judges, granting or denying a preliminary injunction against the enforcement of a State statute, or from a State court of last resort, upon the ground that such statute conflicted with the Constitution of the United States. Some of the cases where this Court has recognized its jurisdiction under like circumstances are:

Clark *v.* Poor, 274 U. S. 554.
Helson *v.* Kentucky, 279 U. S. 245.
In Re Buder, 271 U. S. 461, 464.
Looney *v.* Crane and Co., 245 U. S. 178.
Louisville etc. Railroad Co. *v.* Garrett, 231 U. S. 298.
Pan Handle Oil Co. *v.* Mississippi, 277 U. S. 218.

Shaffer *v.* Carter, 252 U. S. 37, 44.
Smith *v.* Wilson, 273 U. S. 388, 391.
Texas Company *v.* Brown, 258 U. S. 466.
Van Dyke *v.* Geary, 244 U. S. 39.

We respectfully submit, that this Court has jurisdiction of this appeal by virtue of Section 266 of the Judicial Code (being Act of Congress, June 18, 1910, 36 Stat. 557, as amended by 36 Stat. 1162, 37 Stat. 1013, 43 Stat. 938), and Section 238 of the Judicial Code (being Act of Congress, March 3, 1891, 26 Stat. 827, as amended by 29 Stat. 492, 31 Stat. 85, 31 Stat. 158, 35 Stat. 838, 36 Stat. 1157, 38 Stat. 804, and 43 Stat. 938), and under the cases cited.

Respectfully submitted,

WILLIAM H. WHITE, JR.
CHRISTIE BENET.
W. C. McGOWAN.
Counsel for Appellant.

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CHARLES ELMORE CRO
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 504

EASTERN AIR TRANSPORT, INC., COMPLAINANT, APPELLANT,

vs.

SOUTH CAROLINA TAX COMMISSION AND W. G. QUERY, J. P. DERHAM AND FRANK C. ROBINSON, AS MEMBERS OF SOUTH CAROLINA TAX COMMISSION, RESPONDENTS, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF SOUTH CAROLINA.

BRIEF ON BEHALF OF APPELLANT.

WILLIAM H. WHITE, JR.,
Washington, D. C.;
CHRISTIE BENET,
W. C. McGOWAN,
Columbia, S. C.,
Counsel for Appellant.

INDEX.

Subject Index.

	Page
Statement of the case	2
The assigned errors to be urged	4
Argument	4
Assignment of error I	4
Assignment of error II	5
Assignment of errors III, IV, V, VI	5
The nature of the South Carolina tax	7
The burden on appellant	8
The burden of the tax, though imposed upon the seller by law, falls upon the consumer, and such burden is a direct burden	10
The decision of the District Court	14

Table of Cases.

Board of Trade v. Olsen, 262 U. S. 1	17
Boeing Air Transport, Inc., v. Edelman, 51 Fed. (2d) 130	29
Brown v. Maryland, 12 Wheaton 419	5
Central Transfer Company v. Commercial Oil Co., 45 Fed (2d) 400	30
Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282	15
Eastern Air Transport, Inc., v. South Carolina Tax Com., 52 Fed. (2d) 456 (Advance Sheets, Nov. 9, 1931)	2, 14
Federal Trade Commission v. Pacific States Paper Trade Asso., 273 U. S. 52	21
Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196	25
Gregg Dyeing Co. v. Query, Oct. Term, 1931, Docket No. 170.	7, 13, 15
Helson v. Kentucky, 279 U. S. 245	23, 25, 28, 29, 30
Indian Motocycle Co. v. United States, 283 U. S. 570	9, 12, 18, 19, 33
Interstate Transit, Inc., v. Lindsey, 283 U. S. 183	30
Kansas City Ry. v. Kansas, 240 U. S. 227	9
Lemke v. Farmers' Grain Co., 258 U. S. 50	15, 16
Mid-Continent Air-Express, v. Lujan, 47 Fed. (2d) 266	29
New Jersey Bell Tel. Co. v. State Board of T. & A., 280 U. S. 338	33
Norfolk & Western Railroad Co. v. Pennsylvania, 136 U. S. 114	18
Panhandle Oil Co. v. Mississippi, 277 U. S. 218	8, 11, 18, 20, 25, 33
Shafer v. Farmers' Grain Co., 268 U. S. 189	15

Page

South Carolina v. United States, 199 U. S. 437 19
Stafford v. Wallace, 258 U. S. 495 17
Texas Company v. Brown, 258 U. S. 466 ..... 8, 10
Texas T. & T. Co. v. New Orleans, 264 U. S. 150 8
Thames & Mersey Insurance Co. v. United States, 237 U. S. 19 17
United States Airways, Inc., v. Shaw, 43 Fed. (2d) 148 ..... 28, 29
WBT, Inc., v. Poulnot, 46 Fed. (2d) 671 26
Western Union Telegraph Co. v. Kansas, 216 U. S. 1 6

CONSTITUTION.

Constitution of United States, Art. I, §8, Cl. 3 ..... 2, 5

STATUTES.

Digest of State Gasoline Tax Laws, U. S. Av. R., 1930, 514 32
Judicial Code, §266 (28 U. S. C. A. §380) 1
New Mexico Session Laws of 1931, Chap. 31 32
Revenue Act of 1924, §600 13
South Carolina Acts #102, approved March 16, 1929, S. C. Acts 1929 (36 Stat. at Large), pp. 107-113 ..... 3, 7, 27, 35-38

Case in the Court below reported:

Eastern Air Transport, Inc., v. South Carolina Tax Commission, 52 Fed. (2d) 456 (Adv. Sheets 9, 1931).

SUPREME COURT OF THE UNITED STATES.

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SOUTH CAROLINA TAX COMMISSION AND W. G. QUERY, J. P. DERHAM AND FRANK C. ROBINSON, AS MEMBERS OF SOUTH CAROLINA TAX COMMISSION, RESPONDENTS, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF SOUTH CAROLINA.

BRIEF ON BEHALF OF APPELLANT.

This is an appeal from the United States District Court for the Eastern District of South Carolina, three judges sitting, convened pursuant to Section 266 of the Judicial Code. The appellant (complainant in the

Court below) sought an interlocutory injunction to e
join and restrain the South Carolina Tax Commissio
from collecting a tax of six cents per gallon upon gas
line purchased by appellant in the State of South Car
lina, and used by it exclusively in interstate air com
merce, upon the ground that the State laws imposin
such tax were unconstitutional, in so far as applied
appellant's interstate air transportation, being in co
flict with the provisions of Article 1, Section 8, Clau
3, of the Constitution of the United States. The Cou
below denied an interlocutory injunction. Its opinio
is reported in *Eastern Air Transport, Inc.* v. *Sou
Carolina Tax Commission et al.*, 52 Fed. (2d) 456 (A
vance Sheets of November 9th, 1931).

Statement of the Case.

Eastern Air Transport, Inc., is a corporation o
ganized and existing under the laws of the State
Delaware, and is engaged in the transportation of pa
sengers exclusively by airplanes between Newa
(N. J.) airport and Miami, Florida, and in additio
United States mail between Newark, N. J., and oth
points, under contract with the Post Office Departmen
with stops at intermediate points. Weather permi
ting, appellant operates daily, into and out of the Sta
of South Carolina, eight airplanes, carrying passenge
and United States mail. In the State of South Car
lina its airplanes stop only at the cities of Greenvill
Spartanburg, Florence and Charleston. Its entire bus
ness in South Carolina is practically interstate in cha
acter, since it transports no passengers or freight b

tween the South Carolina cities, and has only on infrequent occasions transported at the request of the Post Office Department between those South Carolina cities a small amount of mail, but even as to that, such transportation was in an airplane engaged in an interstate flight (R. 16 *et seq.*).

The propulsion power for appellant's airplanes is produced by internal combustion engines or motors in which the fuel used is gasoline of a very "high test" type, and which is unsuitable for use in automobile engines (R. 17).

Because of the state of the art of flying, and present type of airplane construction, it is impossible for an airplane to make the flight from Newark to Miami, or even a much shorter flight, without refueling at intermediate points. The necessities of appellant's transportation instrumentalities require it, therefore, to fuel in the State of South Carolina, for without so doing, it could not complete its flight or carry the United States mail as required by its contract with the Post Office Department (R. 17).

The laws of South Carolina (see Appendix "A") impose a tax "equal to six (6) cents per gallon on all gasoline * * * sold or consigned, used, shipped or distributed for the purpose of sale within" the State. The tax is imposed upon the seller, but in fact is passed along to the purchaser, and all of such tax is remitted by the seller to the State tax authorities and used solely for State and County highways (R. 39, 40).

Appellant has paid this tax on all gasoline purchased in the State, and has never been able to purchase gaso-

line in South Carolina except upon its payment. The amount paid is "$5000 or more a year" (R. 14, 17, 40).

The Assigned Errors to Be Urged.

The first two assigned errors, Nos. I and II, relate to facts and they will be briefly disposed of (R. 43, 44).

Assignments Nos. III, IV, V and VI relate to the District Court's conclusions of law, and each of them will be urged (R. 44, 45).

Assignments Nos. VII and VIII relate to the Court's refusal to grant the requested relief, and will be urged (R. 45).

These assignments will be considered in the order stated, but assignments Nos. III, IV, V and VI, and assignments Nos. VII and VIII will be treated together.

ARGUMENT.

The Court's "findings of fact" will be considered first, and its "conclusions of law" thereafter.

Assignment of Error No. "I".

We have little fault to find with the Court's interpretation of the facts, but in two respects we think the Court erred, and while in neither of these is the vital legal principle involved affected, we do think it proper to call them to this Court's notice.

The Court should have found as a fact that appellant could not conduct its interstate air transportation business without purchasing gasoline in South Carolina (R. 17). In carrying the United States mail its planes stop in South Carolina (R. 16) and its flying opera-

tions can not be carried out without refueling its airplanes in that State (R. 17).

Assignment of Error No. "II",

The Court found that "the maintenance of the public roads of the State is important to the carrying on of complainant's business" because they facilitate "its business and increases its patronage." Such a general statement could probably be correctly made with respect to any and all business carried on in South Carolina, but in this case it is only a general deduction or assumption, for there is not in the record one iota of evidence that good roads in South Carolina add a single passenger, or an additional pound of mail to appellant's business.

Assignments Nos. "III", "IV", "V", and "VI".

These assignments relate to the Court's "Conclusions of Law". It seems unnecessary to treat them separately, for they are all incident to, or express in different ways, the legal error of the Court, namely, its refusal to hold the South Carolina gas tax law unconstitutional as applied to appellant's interstate air business.

Article I, Section 8, Clause 3 of the Constitution of the United States provides that the Congress shall have power "To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes." It was early said by Chief Justice Marshall in *Brown* v. *Maryland*, 12 Wheaton 419, that a State law imposing a tax may be a form of "regula-

tion" of commerce among the States. The principle that a State tax law may regulate commerce among the several States, and hence be repugnant to the Constitution, has never since *Brown* v. *Maryland* been seriously challenged. The difficulty arises in the application of the principle.

A review of the decisions of this Court leads to certain conclusions, viz: a State tax which is a direct burden—as distinguished from an incidental burden; or a State tax which though "indirect" nevertheless imposes an "undue" burden upon interstate commerce, or which discriminates against interstate commerce, are all repugnant to the Commerce clause of the Constitution. On the other hand, there are certain taxes, e. g., a property tax, which under certain circumstances are not repugnant to the Constitution even though they may in effect burden interstate commerce. The general principle has been stated by this Court, speaking through the late Justice Harlan, in *Western Union Telegraph Company* v. *Kansas*, 216 U. S. 1, 27, as follows:

> "If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business."

Bearing this rule in mind and as a prerequisite to a discussion of the main question the first inquiry would seem to be

The Nature of the South Carolina Tax.

The South Carolina law imposes the tax upon "every oil company, person, firm or corporation doing domestic or intrastate business within this State, and engaging in the business of selling, consigning, using, shipping, or distributing for the purpose of sale within this State, any gasoline * * * etc." The seller is required to make a monthly report of sales under oath to the South Carolina Tax Commission and to remit the amount of the tax shown by such report.

The State law is denominated in the act itself "License Tax on Dealers in Gasoline", while the Supreme Court of South Carolina in *Gregg Dyeing Company* v. *South Carolina Tax Commission*,* — S. E. —, held it to be an "excise tax". The District Court recognized it as an excise tax, but proceeded to treat it as a property tax, wherein it erred, as will be later on pointed out.

The opinion in *Gregg Dyeing Company* v. *South Carolina Tax Commission* reviews the legislative history of the State's gas tax laws, and says:

> "The tax here imposed is an excise tax and not a property tax."

It is true that in that case the Court had before it the Act of 1930 relating to taxes upon gasoline imported into the State, but in its opinion it discusses and

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* This case not yet reported, but the Court's opinion appears in the record in *Gregg Dyeing Company, Petitioner*, v. *W. G. Query et al.*, October Term, 1931, No. 170.

treats as a whole the several State gas tax laws including that one under consideration here, and we think the Court in the above-quoted language referred to the State gas tax laws taken as a whole.

The highest Court of South Carolina declares the tax to be an "excise" tax, which under the public policy of the State of South Carolina rests upon the consumer—"the burden actually rests upon the ultimate consumer" says the Court. The facts show that the tax is passed along to appellant and must be paid before it can purchase gasoline in South Carolina, which result is quite in accord with similar taxes, as this Court has held in *Texas Company* v. *Brown*, 258 U. S. 466, and *Panhandle Oil Company* v. *Mississippi*, 277 U. S. 218.

The tax involved being an "excise" tax, it becomes unnecessary to discuss property and other forms of taxes as they may affect interstate commerce. For, as Mr. Justice Brandeis says in his dissenting opinion in *Texas Transport and Terminal Company* v. *City of New Orleans*, 264 U. S. 150, 155:

> "The validity of a State tax under the Commerce clause does not depend upon its character or classification. It is not void merely because it affects or burdens interstate commerce. The tax is void only if it directly burdens such commerce, or (where the burden is indirect) if the tax discriminates against or obstructs interstate commerce."

The Burden on Appellant.

Since it is the public policy of South Carolina for the burden of the tax to rest upon the ultimate consumer,

and since the tax is in fact paid by the ultimate consumer, and since appellant cannot buy gasoline in South Carolina without paying the tax, the "practical effect of enforcement" (quoting from *Panhandle Oil Company* v. *Mississippi, supra*) is the same as if the law in so many words laid the tax on the ultimate consumer. Indeed the laying of the tax on the seller is little more than was suggested by this Court in *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, as "a comprehensive and convenient mode of reaching all first or initial sales", in other words of collecting the tax. Certainly the "practical effect of enforcement" upon the appellant is the same as if the tax were laid directly upon it, while the actual burden upon appellant as found by the Court below "amounts to $5,000 per year or more."

It is not the language of the law, but its operation and effect as enforced, which controls. Mr. Chief Justice Hughes points this out in *Kansas City Ry.* v. *Kansas,* 240 U. S. 227, 231,

> "And, further, in determining whether a tax has such a direct relation to interstate commerce as to be an exercise of power prohibited by the commerce clause, our decision must regard the substance of the exaction—its operation and effect as enforced—and cannot depend upon the manner in which the taxing scheme has been characterized."

It needs little imagination to perceive that such a burden in one State, if repeated in other States through which appellant must operate its airplanes under its

contract to carry the mails of the United States, would soon become so heavy as to be prohibitive.

The Burden of the Tax, Though Imposed Upon the Seller by Law, Falls Upon the Consumer, and Such Burden is a Direct Burden.

We think this proposition so thoroughly sustained by three very recent decisions of this Court that it is unnecessary to cite further authority.

In *Texas Company* v. *Brown*, 258 U. S. 466, this Court had before it a combined inspection and revenue law of the State of Georgia, the amount of fees to be paid to be determined by the amount of petroleum products to be inspected. In the opinion the Court said at p. 479:

> "The tax, to describe it according to its essential nature, is an excise upon domestic sale or storage, designed to affect the use of the products—a tax imposed at the time of inspection, the inspector acting also as tax gatherer; inspection and tax payment required but once and that, ordinarily, from the dealer at the time of the first domestic sale or during storage preliminary to such sale. The self interest of the dealer and the customs of trade are relied upon to add the tax to the price of the product, and thus pass it on to the ultimate consumer—a method appropriate in indirect taxation and certainly a not unreasonable mode of distributing the burden among those who share in the benefits.
>
> "That the legislature intended the effect of the tax to fall upon the ultimate consumer is evident, not only from the obviously inevitable result of requiring its payment, ordinarily, by the

first domestic seller, but from the specific provisions of the amendatory act of 1913, that the 1912 Act 'shall apply not only to gasolines, benzins, and naphthas sold or offered for sale in the State of Georgia, but likewise to all such commodities that may be sold elsewhere and brought into the State of Georgia, for consumption or use.'"

A more recent decision of this Court to the same effect, is *Panhandle Oil Company* v. *Mississippi*, 277 U. S. 218. In that case the Mississippi statute provided that any person engaged in the business of distributing gasoline, or retail dealer in gasoline, should pay an excise tax upon the sale of gasoline, except that sold in interstate commerce or imported for personal use.

The question as to the constitutionality of the statute arose on the sale of gasoline to the United States Coast Guard Fleet and the United States Veterans Hospital. The State of Mississippi sued the distributor for the tax on sales made to the Coast Guard and hospital and the distributor defended, on the ground that the tax was a direct tax against the purchaser, and was unconstitutional as imposing a substantial burden upon an instrumentality of the United States Government. This Court held that it was a direct tax against the purchaser, and was a substantial burden upon the Government in carrying on a constitutional governmental function and, therefore, void. In the opinion the Court said:

"The validity of the taxes claimed is to be determined by the practical effect of enforce-

ment in respect of sales of (sic) the Government. *Wagner* v. *Covington*, 251 U. S. 95, 102, 64 L. Ed., 157, 167, 40 S. C. Rep. 93. A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the seller and not the purchaser is required to report and make payment to the State. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. The amount of money claimed by the State rises and falls precisely as does the quantity of gasoline so secured by the Government. It depends immediately upon the number of gallons. The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion by the United States, of its constitutional powers to operate the fleet and hospital. (Citing cases.) To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale (citing cases), and that is to tax the United States—to exact tribute on its transactions and apply the same to the support of the State.

"The exactions demanded from petitioner infringe its right to have the constitutional independence of the United States in respect of such purchases remain untrammeled. (Citing cases.) Petitioner is not liable for the taxes claimed. Judgment reversed" (p. 222).

The third case is *Indian Motocycle Company* v. *United States*, 283 U. S. 570, which is directly in point as sustaining complainant's position in this case, that the tax is upon the ultimate consumer. In that case plaintiff sold a motorcycle to the City of Westfield, Massa-

chusetts, for use in its police department. A tax in respect of the sale was assessed and collected from plaintiff under Section 600 of the Revenue Act of 1924, which provides that there "shall be levied, assessed, collected and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased." Motorcycles are among the articles mentioned. Manufacturers, producers and importers are required to make returns of their sales and to pay the tax.

The Court construed this section of the Act to place an excise tax on the sale of the article and said:

> "Counsel for the Government base their contention on the requirement that the tax be paid by 'the manufacturer, producer or importer' but we think this requirement is intended to be no more than a comprehensive and convenient mode of reaching all first or initial sales, and that it does not reflect a purpose to base the tax in any way on manufacture, production or importation" (p. 574).

To the foregoing there may be added *Gregg Dyeing Company* v. *Tax Commission, supra,* wherein the Supreme Court of South Carolina, in construing the several State gasoline tax laws, said:

> "Statutes of this nature have been uniformly construed as imposing a tax on the ultimate consumer or user * * *."

and again

> "The public policy of the State of South Carolina, as expressed in this Legislation, taking it

as a whole, is that all consumers shall pay the gallonage tax of six cents."

The Decision of the District Court.

Since the Court below had before it all the cases cited in this brief, and reached a conclusion which we submit is wrong, it seems necessary to discuss its opinion.

Circuit Judge Parker, speaking for the Court below, said: "We attach no importance to the fact that the tax is described in the statute as a privilege or license tax; for, where such tax is measured by sales, it is in effect a sales tax, whatever it may be called." After declaring it "not a property tax within the meaning of the South Carolina Constitution, but an excise tax" (citing *Gregg Dyeing Company* v. *Tax Commission*) he proceeds to treat it as a property tax, and devotes a part of the opinion to a discussion based upon the "property tax" idea. It seems, therefore, unnecessary to discuss further this phase of the opinion.

The Court's decision is based:

> "* * * on the fact that the sale by which the tax is measured is not a transaction in interstate commerce, and that the gasoline sold does not become an instrumentality of such commerce until after the sale is complete * * *" (p. 460).

This we construe to mean that sale and subsequent use are separate and distinct acts, having no more relation to each other than if performed by different persons, at different times, and without regard to each other. But such, of course, is not the fact, nor the re-

sult. Moreover the Court quite overlooks the fact that the burden of the tax "actually rests upon the ultimate consumer". *Gregg Dyeing Co.* v. *Tax Commission, supra.* A State cannot tax instrumentalities of interstate commerce or their use—as we shall show later—wherefore, it must follow that a tax intended to fall upon and which does fall upon the ultimate consumer or user, has precisely the same effect as if laid upon use rather than sale. There can be no use without a previous sale, or purchase. The one leads to the other.

In seeking to treat "sale" as separate and distinct from subsequent use, the Court below overlooks the principle decided by this Court in such cases as *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, and *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189. These cases relate to State laws, which, in brief, required grain buyers to purchase and pay for a license before engaging in the buying of grain. The statutes were challenged on the ground of their repugnance to the Commerce clause of the Constitution as to grain bought for shipment in interstate commerce. This Court, in holding the State laws unconstitutional, treated the act of buying—though performed wholly within a State—as a part of the interstate transaction of shipment, Mr. Justice Van Devanter, saying in *Shafer* v. *Farmers Grain Co., supra*, at p. 198, "Buying for shipment, and shipping, to markets in other States, when conducted as before shown, constitutes interstate commerce—the buying being as much a part of it as the shipping." Without going into the details of the manner in which the busi-

ness was transacted it seems sufficient to quote again from the same case at p. 195;

> "All buy with the purpose of shipping to and selling in terminal markets outside the State, and carry out this purpose in the manner already described."

In other words, there was a regular and established business of buying grain in one State for shipment to another State, and the grain so bought was shipped in interstate commerce. The analogy to the present case is, we submit, exact. Here the appellant buys a special type of gasoline intended for use in airplanes; it intends to use that gasoline, and does in fact use it, only in airplanes engaged exclusively in interstate commerce. A course of business in which the seller and buyer necessarily know the use to which the gasoline will be put is not like the case of a sale of a commodity which may or may not be shipped in interstate commerce, and which is sold and bought without regard to its subsequent use.

But the Court below, in seeking to separate the sale from use, does exactly what Mr. Justice Day in *Lemke* v. *Farmers Grain Co., supra,* at p. 58, says cannot be done. To quote his words:

> "Nor will it do to say that the State law acts before the interstate transaction begins. It seizes upon the grain and controls its purchase at the beginning of interstate commerce. *Pennsylvania R. Co.* v. *Clark Bros. Coal Min. Co.*, 238 U. S. 456, 468, 59 L. Ed. 1406, 1411, 35 Sup. Ct. Rep. 896."

The purchase is a mere "incident" in the course of regular and consistent interstate business, or as the late Chief Justice Taft put it in *Board of Trade* v. *Olsen*, 262 U. S. 1, 35:

> "It (*i. e.*, *Swift & Co.* v. *United States*, 196 U. S. 375) refused to permit local incidents of great interstate movement, which, taken alone, were intrastate, to characterize the movement as such."

If, therefore, the sale in this case standing alone would be an intrastate transaction, it nevertheless ceases to be such when it becomes a mere incident in a great interstate movement, such as appellant's business is shown to be. *Stafford* v. *Wallace*, 258 U. S. 495.

The exigencies of a trade determine what is essential to the business or process of interstate commerce in that trade. *Thames & Mersey Insurance Co.* v. *United States*, 237 U. S. 19. It is impossible for appellant to conduct its interstate business into and out of the State of South Carolina without refueling its planes in that State with gasoline which it must buy therein. The purchase of gasoline in South Carolina is just as indispensable to the uninterrupted conduct of appellant's interstate business as the sales at the Chicago stock y rds—which *per se* were local transactions but were held by the Court in *Stafford* v. *Wallace*, *supra*, to be so intimately associated with interstate commerce as to be a part thereof—were essential to the continuity of the flow of cattle from the ranges in the west to the markets in the east. The State of South Carolina, therefore, had no power to tax these sales,

just as in *Norfolk & Western Railroad Co.* v. *Pennsylvania,* 136 U. S. 114, 120, the State of Pennsylvania could not impose a license tax upon a railroad company engaged in interstate commerce for the privilege of maintaining an office in the State. As the Court there said "that office was maintained because of the necessities of the interstate business of the company, and for no other purpose. A tax upon it, therefore, was a tax upon one of the means or instrumentalities of the company's interstate commerce; and as such was in violation of the commercial clause of the Constitution of the United States".

The Court below has, we submit, failed to grasp the true principle of *Panhandle Oil Co.* v. *Mississippi,* 277 U. S. 218, and *Indian Motocycle Co.* v. *United States,* 283 U. S. 570. The former involved the Mississippi State tax on gasoline purchased by the United States for Coast Guard cutters and hospitals, and the latter the United States sales tax on motorcycles purchased by the City of Westfield. As to those cases the Court below said: "In the case of a sale to the Federal Government or a State, it is the character of one of the parties to the transaction which exempts it from taxation." *It is not the character of the purchaser which exempts the transaction from taxation, but the character of the use of the article purchased,* which brings about the exemption.

In the *Panhandle case* Mr. Justice Butler particularly pointed out that "The United States is empowered by the Constitution to maintain and operate the fleet and hospital". In other words, the gasoline

was bought to be used in carrying on a governmental function. To quote further:

> "While Mississippi may impose charges upon petitioner for the privilege of carrying on trade that is subject to the power of the State, it may not lay any tax upon transactions by which the United States secures the things desired for its *governmental purposes.*" (Italics ours.)
>
> * * * * * * *
>
> "The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion by the United States, of its *constitutional* powers to operate the fleet and hospital." (Italics ours.) (pp. 221, 222.)

In the *Indian Motocycle case,* the articles purchased were "for use by the city in its police service", and it is perfectly clear from the Court's opinion that the exemption resulted not from the mere fact of purchase by a municipal corporation, but from the fact of the governmental use to which the articles were put. It must follow, we think, that, had the *use* not been a governmental one in either of the above cases, the *character* of the purchaser, standing alone would not have brought about exemption. *South Carolina* v. *United States,* 199 U. S. 437.

If then it is the *use* to which the article purchased is put, and not the *character* of the purchaser, which produces exemption from taxation, it must follow that a tax upon a sale becomes a tax upon use, since the use which brings about the exemption comes into existence only *after* the sale.

The exemption of the United States from taxation in the *Panhandle Oil case* comes about because the United States was performing a governmental function provided for by the Constitution; in the present case appellant's interstate commerce business is likewise protected from burdens by a provision of the Constitution. The burden upon the use by the United States of gasoline in its Public Health Service was measured by a tax on its sale or purchase; the burden upon appellant's interstate business is equally measured by a tax upon the number of gallons of gasoline purchased. Under the Mississippi statute and under the South Carolina statute the tax is collected at the time of the sale. In the *Panhandle case* the tax was collected at the time of the sale but the exemption, as we have pointed out, results not from the fact that the United States was the purchaser, but from the fact that the United States purchased in order that it might perform a governmental function which it was authorized under the Constitution to do. The analogy to this case is exact. Even though the tax is collected at the time of the sale on an article intended to be used, and which in fact is used, in interstate commerce, the resulting burden is exactly the same as if the tax was not imposed until the gasoline was actually used in appellant's aircraft. Were the gasoline in this case being purchased and used in intrastate commerce, it would be subject to tax just as would the motorcycles purchased by the City of Westfield have been subject to tax had they not been intended for use, and actually used, by that municipality in performing a govern-

mental function, and just exactly, we submit, as would have been the fact in the *Panhandle case* had the gasoline there purchased by the United States been intended for use and actually used in some non-governmental activity.

That an event subsequent to a sale may convert the sale into an interstate transaction is decided by this Court in *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U. S. 52. There the question was "whether the sale by the wholesaler to the retailer in the same State is a part of interstate commerce where, subsequently at the instance of the seller and to perform his part of the contract, the paper is shipped from a mill in another State to or for the retailer." Speaking through Mr. Justice Butler the Court said at p. 64:

> "And what is or is not interstate commerce is to be determined upon a broad consideration of the substance of the whole transaction. *Dozier* v. *Alabama*, 218 U. S. 124, 128, 54 L. Ed. 965, 967, 28 L. R. A. (N. S.) 264, 30 Sup. Ct. Rep. 649. Such commerce is not confined to transportation, but comprehends all commercial intercourse between different States and all the component parts of that intercourse. *And it includes the buying and selling of commodities for shipment from one State to another. Dahnke-Walker Mill. Co.* v. *Bondurant*, 257 U. S. 282, 290, 66 L. Ed. 239, 243, 42 Sup. Ct. Rep. 106; *Lemke* v. *Farmers' Grain Co.*, 258 U. S. 50, 55, 66 L. Ed. 458, 462, 42 Sup. Ct. Rep. 244. The absence of contractual relation between the manufacturer and retailer does not matter. *The sale by the wholesaler to*

> when the retailer is the initial step in the business completed by the interstate transportation and delivery of the paper. Presumably the seller has then determined whether his source of supply is a mill within or one without the State. If the contract of sale provided for shipment to the purchaser from a mill outside the State, then undoubtedly it would be an essential part of commerce among the States. *Sonneborn Bros.* v. *Cureton* (*Sonneborn Bros.* v. *Keeling*), 262 U. S. 506, 515, 67 L. Ed. 1095, 1100, 43 Sup. Ct. Rep. 643. Clearly the absence of such a provision does not affect the substance of the matter when in fact such a shipment was contemplated and made. *Cf. Dozier* v. *Alabama, supra; Western U. Teleg. Co.* v. *Foster*, 247 U. S. 105, 113, 62 L. Ed. 1006, 1015, 1 A. L. R. 1278, P. U. R. 1918D, 865, 38 Sup. Ct. Rep. 438; *Lemke* v. *Farmers Grain Co., supra*, 55 [66 L. Ed. 462, 42 Sup. Ct. Rep. 244]. The election of the seller to have the shipment made from a mill outside the State makes the transaction one in commerce among the States. And on these facts the sale by jobber to retailer is a part of that commerce." (Italics ours.)

It will be observed that at the time of the sale the paper might be supplied from a mill within or without the State, but when supplied from the latter and shipped into the State in interstate commerce, despite the interval of time which might elapse between the sale and the shipment, the sale itself became a part of an interstate transaction, thus we think demonstrating the fallacy of the reasoning of the Court below that the sale is not a transaction in interstate commerce be-

cause the gas sold only becomes an instrumentality of interstate commerce *after* the sale is complete. We submit that as appellant's business is conducted use in interstate commerce after the sale relates back to the sale, and makes the sale a part of an interstate transaction.

We submit that there is no difference in principle between "buying and selling commodities for shipment from one State to another," and buying gasoline in one State to be used as fuel in an interstate air journey.

Since it is the use to which the article is put which determines exemption, it would seem to follow that the Court below erred in separating use and sale, and holding the South Carolina law constitutional on the theory that the gasoline does not become an instrumentality of interstate commerce until after the sale is complete. Sale and use are just as inseparable in this case as they were in the *Panhandle case* and in the *Indian Motocycle case.*

The Court again erred, we respectfully submit, in its interpretation of the case of *Helson* v. *Kentucky*, 279 U. S. 245. In that case a ferry boat engaged in interstate commerce between the States of Kentucky and Illinois purchased in Illinois all of the gasoline used to produce its motive power. Seventy-five per cent of the gasoline was consumed within the limits of Kentucky, and that State sought to collect a tax from the ferry company under a State law which imposed a tax of three cents a gallon on all gasoline sold within the State, the word "sold" being by the statute made to include "use" within the State. Mr. Justice Sutherland, speaking for the Court, said at p. 252:

> "The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce. It reasonably cannot be distinguished from a tax for using a locomotive or a car employed in such commerce. A tax laid upon the use of the ferryboat would present an exact parallel. And is not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax which falls directly upon the use of one of the means by which commerce is carried on directly burdens that commerce. If a tax cannot be laid by a State upon the interstate transportation of the subjects of commerce, as this Court definitely has held, it is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected."

The Court below said, at p. 459:

> "The question of the right of Kentucky to tax sales of gasoline intended for use in interstate commerce was not involved. The question was the right of that State to tax the use in interstate commerce of gasoline purchased in another State. It was held that the State was without power to tax the use of an instrumentality of interstate commerce, which is manifestly a very different question from that involved in the right of a State to tax the sale within its borders of an article designed by the purchaser for use in interstate commerce."

The District Court, we think, has placed too narrow a construction upon this Court's decision in *Helson* v. *Kentucky*. We submit that this Court did not intend

to limit its decision to "use" merely, but on the contrary by its approval of the language of Mr. Justice Field in *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 214, to wit: "all restraints by exactions in the form of taxes upon such transportation, or upon acts necessary to its completion, are so many invasions of the exclusive power of Congress to regulate that portion of commerce between the States", clearly indicated that a restraint, whether by way of a tax upon "use" or a tax upon a sale for use, where the former is "necessary to its completion", is an unlawful burden upon interstate commerce.

If the Court is right in its view of *Helson* v. *Kentucky,* and this Court has decided nothing more than the District Court asserts that it did, nevertheless we submit that, even under such interpretation of that case, the South Carolina law in its practical operation is unconstitutional as to this appellant's interstate air transportation. We have shown we think that the tax is intended to fall upon and does fall upon the consumer; that in its practical operation this is equivalent to a use tax since there can be no use without the payment of the tax. It would, therefore, seem to follow that, even under the very narrowest interpretation given to the principle decided in *Helson* v. *Kentucky,* that principle covers the facts of this case.

Applying Mr. Justice Butler's language in *Panhandle Oil Company* v. *Mississippi, supra,* the State "may not lay any tax upon transactions by which the United States secures the things desired for its governmental functions," does it not follow that the tax here is upon a transaction whereby the appellant secures

the things necessary for conducting its interstate commerce operations? The constitutional provision, empowering the United States to maintain and operate the fleet and hospital, is of no greater dignity than the constitutional provision whereby Congress regulates commerce among the States; if under the Constitution a State "may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes", it must follow equally that a State may not lay any tax upon a like transaction essential to interstate commerce and equally protected by the Constitution. As previously pointed out, the practical effect in this case is that the burden upon appellant's interstate commerce is exactly the same whether the tax be laid upon use or sale.

The District Court's restricted views in this case as to what is interstate commerce show a very marked departure from its broad views expressed in its somewhat earlier decision in *Station WBT, Inc.* v. *Poulnot*, 46 Fed. (2d) 671. In that case the Court had before it a law of the State of South Carolina imposing a tax upon radio receiving sets, which tax was in the nature of a license tax for the privilege of using them. Station WBT, broadcasting from Charlotte, North Carolina, sought and obtained an injunction restraining the enforcement and collection of the tax, not because any portion of the tax fell upon it, but because the payment of the tax by radio receiving set owners in the State of South Carolina would tend to cut down their number, thus decreasing the audience who might "listen in" to broadcasting from Station WBT and thereby lessen the amount received from advertisers

"seeking to reach the South Carolina audience exclusively". The Court held that communication by radio constituted interstate commerce; that the tax was not a property tax *but a license tax* for the privilege of using an instrumentality of interstate commerce; that the tax was laid directly upon a necessary instrument of interstate commerce and that the law imposing it, therefore, conflicted with the Constitution of the United States and was void. This conclusion was reached despite the fact that no part of the tax was paid by Station WBT. We respectfully suggest that, even though the sending of broadcasting programs from one State to another comes within the category of interstate commerce, nevertheless the burden imposed by the South Carolina law in so far as it affected Station WBT—not the owners of receiving sets who paid the tax but were not parties to the proceeding—was extremely remote and indirect on Station WBT's interstate business compared to the burden upon appellant's interstate business.

The District Court in its opinion failed to advert to certain language of the South Carolina law which we think has a most important bearing on this case. We refer to that portion of Section 1 of the statute which reads: "that every oil company, person, firm or corporation *doing domestic or intrastate business within this State* * * *." (Italics ours.) Since the burden of the tax falls upon the consumer, and since it is the policy of the State of South Carolina that it should fall upon the consumer, it would seem to follow that, if the consumer be engaged in interstate business and not in "domestic or intrastate business", the provi-

sions of the act are not applicable to such interstate business. Or, putting it another way: the policy of the State of South Carolina requires that the nature of the consumer's, i. e. the taxpayer's, business be considered, and if that business be not "domestic or intrastate", the law is not intended to apply, for its very terms indicate a clear purpose not to burden an interstate business.

The view which we place upon *Helson* v. *Kentucky, supra,* is the same as is placed upon it by the majority of Circuit and District Courts which have passed upon this subject since the decision in that case.

In *United States Airways, Inc.* v. *Shaw,* 43 Fed. (2d) 148, a statutory Three Judge Court, sitting for the Western District of Oklahoma, in construing the gas tax law of that State, granted a perpetual injunction against its collection, basing its decision upon *Helson* v. *Kentucky.* It is true that the Court, in referring to the Oklahoma statute, says that it levied a tax "on all gasoline consumed in the State", but it appears from the facts that United States Airways, Inc., *bought* its gasoline largely in Oklahoma and that the tax in question was borne by it in the price it paid to the consignees and distributors of the gasoline, so that obviously the tax was collected and paid at the time of purchase. Even though denominated a consumption tax, it was in fact a sales tax, and the Court held complainant entitled to a perpetual injunction "against the collection by the State of the tax upon gasoline they may hereafter *buy in the State for use in their combined interstate and intrastate transportation business*". (Italics ours.)

In *Mid-Continent Air Express* v. *Lujan*, 47 Fed. (2d) 266, a statutory Three-judge Court, sitting for the District of New Mexico, granted an injunction against the collection of the gas tax imposed by the laws of that State. The New Mexico law then under consideration contained two sections, one imposing a tax on consumption and the other on sale. It appears from the facts, as stated by the Court, that Mid-Continent Air Express Corporation purchased its gasoline at Albuquerque in New Mexico from a wholesale distributor, and that "such distributor collects from plaintiff five cents per gallon on each gallon of such gasoline on account of such excise tax, and remits such collections to the Comptroller." In other words, the facts actually being passed upon in that case related to sales. The Court there found no difficulty in holding that *Helson* v. *Kentucky* controlled, and granted an injunction against the collection "of such tax *on gasoline purchased by it for use in interstate commerce*". (Italics ours.)

In *Boeing Air Transport, Inc.*, v. *Edelman*, 51 Fed. (2d) 130, the Wyoming gas tax law was before the Court for the District of Wyoming. The Court based its decision on certain facts which are not existent in this case, but states that had the facts been the same as those in *Mid-Continent Air Express* v. *Lujan, supra*, and *United States Airways* v. *Shaw, supra*, it would have on the authority of those cases and *Helson* v. *Kentucky* reached a like conclusion.

As opposed to the foregoing decisions we have that of the Three-judge Court from which this appeal is

taken, and likewise the decision of a Three-judge Court for the Eastern District of Missouri in *Central Transfer Company* v. *Commercial Oil Company,* 45 Fed. (2d) 400. In that case Central Transfer Company, operating an interstate freight bus line between Missouri and Illinois, sought an injunction against the collection of the tax imposed by the Missouri law upon gasoline purchased by it in Missouri, and there, and elsewhere used. In referring to *Helson* v. *Kentucky, supra,* the Court takes the view that the decision in that case was limited solely to a tax upon "use". It is further apparent from the opinion that the Court was inclined to treat the tax as a property tax. It should also be pointed out that in that case Central Transfer Company operated buses over the highways of Missouri, which presents quite a different situation from appellant's operations in this case. The tax could probably have been sustained under the principle laid down by this Court in *Interstate Transit, Inc.,* v. *Dick Lindsey,* 283 U. S. 183. The tax in that case was not a gasoline tax, but was imposed upon concerns operating interstate motor buses, and was in the nature of a privilege tax of $500 a year "for each vehicle seating more than 20 and less than 30 passengers." Mr. Justice Brandeis pointed out that a tax "as compensation for the use of public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon", might be imposed even though the motor vehicles were engaged exclusively in interstate commerce. As such a tax would be a direct burden on interstate commerce, it

could not be sustained "unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic."

Of course the appellant's airplanes do not use the highways of South Carolina and the suggestion in the opinion of the Court below that "the maintenance of the public roads is important to the carrying on of complainant's business, as such roads must be maintained to its airports for the benefit of its passengers," is a mere assumption on the part of the Court, since as pointed out there is no evidence in the record to indicate or to even suggest that good or better roads in the State of South Carolina added a single passenger to plaintiff's business or a single pound of mail. Perhaps it might be permitted to say, that experience does not prove that people travel by airplane, or are restrained from traveling by airplane, because the roads leading to an airport are good or bad; passenger air traffic is brought about by other considerations, more particularly by the convenience of the location of air terminals, and the time consumed in making a particular journey. It perhaps would be equally as appropriate to suggest, that persons placing airmail stamps upon their letters, do not stop to think whether the road leading to the airport from which the airplane carrying their letters will depart, is a good or a bad road.

Certainly the tendency of State legislation respecting gasoline tax laws leads to the conclusion that States recognize that where the gas tax is applied to the con-

struction and maintenance of the State highways, it is, to say the least, inequitable to exact a tax upon gasoline sold and which is not to be used upon a State highway, and the majority of States, even in their eagerness to secure revenue, have not sought to tax gasoline used in aircraft. See *United States Aviation Report*, 1930, "*Digest of State Gasoline Tax Laws*," page 514, from which it appears that in thirty-one States gasoline consumed elsewhere than on State highways, which of course includes gasoline used in aircraft, is either exempt from taxation, or the tax paid is refunded, and several States specifically exempt gasoline purchased for use in aircraft. To the list there set out should be added the State of New Mexico which recently enacted a law providing for a refund upon gas purchased and used for purposes "other than in motor vehicles operated or intended to be operated upon any of the public streets or highways in the State of New Mexico." Chapter 31 of the New Mexico Session Laws of 1931.

As the tax involved is an excise tax, there can be eliminated from discussion other forms of taxation affecting interstate commerce such as property taxes, taxes upon franchises, taxes measured on a property or capital stock basis, or taxes measured by net income, and the decisions relating to such taxes. Especially does it differ from a tax upon "net income", which in many instances is upheld, even though portions of such income be derived from interstate commerce, because here the tax must be paid even though there be no net income. The necessary operation of this stat-

ute is to tax appellant's gross receipts derived wholly from interstate commerce. This cannot be lawfully done. *New Jersey Bell Tel. Co.* v. *State Board of T. & A.*, 280 U. S. 338.

It is a tax collected at the time of sale and measured by the quantity of gasoline purchased; it is, therefore, identical with the tax considered in *Panhandle Oil Co.* v. *Mississippi, supra,* and *Indian Motocycle Company* v. *United States, supra.* The burden of the tax falls and is intended to fall upon the "ultimate consumer or user" (*Gregg Dyeing Co.* v. *Tax Commission, supra*) and that burden is identical whether the tax be upon use, or a sale followed by use. "The practical effect of enforcement" is that appellant's interstate transportation is burdened in South Carolina to the extent of "$5,000 or more" every year—a like burden in other States would soon make air transportation so costly as to be prohibitive. To say, under circumstances such as exist here, that a tax upon the "use" of gasoline in appellant's airplanes would be a burden upon interstate commerce, while the same tax required to be paid before the gasoline can be used, would not be such a burden, is to ignore the practical effect of enforcement in respect to sales to appellant. A tax upon "use", and a tax prior to use, which must be paid before there can be a "use", are for all practical purposes one and the same. The South Carolina gas tax simply means that appellant pays an additional sum in order that it may have the *privilege of using* gasoline bought in South Carolina, in its interstate airplane commerce.

We submit that in any aspect of the case the tax upon appellant is a direct and extremely substantial burden upon its interstate operations; that the Court below erred in failing to hold that the South Carolina law is void and unconstitutional as to gasoline bought by appellant for use in its interstate air commerce, and in denying the relief sought, and that its action in so doing should be reversed.

Respectfully submitted,

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Counsel for Appellant.

APPENDIX "A".

Act of the General Assembly of the State of South Carolina, approved February 23, 1922 (South Carolina Acts 1922, pages 835-838), as amended by Act No. 146 of 1923, Act No. 731 of 1924, Act No. 34 of 1925, and Act No. 102 of 1929 (South Carolina Acts, 1929, pages 107-112), provides in part:

"SECTION 1. *License Tax on Dealers in Gasoline—Collection.*—Be it enacted by the General Assembly of the State of South Carolina: That every oil company, person, firm or corporation doing domestic or intrastate business within this State, and engaging in the business of selling, consigning, using, shipping, or distributing for the purpose of sale within this State, any gasoline or any substitute therefor, or combination thereof, for the privilege of carrying on such business shall be subject to the payment of a license tax, which tax shall be measured by and graduated in accordance with the volume of sales of such oil company within the State. Every such oil company shall pay to the State an amount of money equal to six (6) cents per gallon on all gasoline, combinations thereof, or substitutes therefor, sold or consigned, used, shipped or distributed for the purpose of sale within the State. That every oil company subject to the tax provided for in this Act shall, on or before the 20th day of each month, and every month, make out and file with the South Carolina Tax Commission a return under oath, in such form as may be prescribed by said South Carolina Tax Commission showing the number of gallons of gasoline, combinations thereof, or substitutes therefor, which have been sold or consigned, used, shipped or distributed for the purpose of sale within the State during the previous month and shall at the same time

remit to the State Treasurer the amount of the tax provided by this Act. And every such oil company shall keep a record, or records, showing all purchases and dispositions of all gasoline, combinations thereof, or substitutes therefor, and such records shall be at all times subject to inspection by any agent of the South Carolina Tax Commission or the Department of Agriculture, Commerce and Industry."

"SECTION 2. *Distribution of Proceeds.*—The license tax of six (6) cents per gallon on gasoline as herein levied and provided for shall be distributed as follows:

"Five (5c) cents on each gallon shall be turned over to the State Highway Department for the purposes of said Department and one (1c) cent per gallon shall be distributed to the Counties of the State to be used exclusively for the construction and maintenance of County roads, and the distribution of the one (1c) cent per gallon license tax among the Counties shall be on the same basis and by the same method as now provided by law for the distribution of the two (2c) cents gasoline tax formerly or heretofore distributed among the Counties."

"SECTION 3. *Use of Portion Allotted to State Highway Department.*—Out of the five (5c) cents gasoline tax herein allocated for the purposes of the State Highway Department, together with other current income or other funds of said Department, the State Highway Commission or Department shall make payments or reimbursements as follows:

"(*a*) The appraised value of any hard surfaced roads, or concrete bridges connecting with other States, now in the State Highway System constructed by any County or Counties either before or after the passage of Act No. 731, of the Acts of 1924, shall be reimbursed or paid to such County, reimbursements to be made on the basis of valuation for hard surfaced roads pro-

vided for in Section 3 of Act No. 731 of the Acts of 1924. Such reimbursements shall be made to such county in annual installments over the period of years ending in 1943. All unpaid obligations of the State Highway Commission coming under the provisions of this clause shall bear interest at the rate of four and one-half per centum per annum, payable semi-annually, or if any County shall have issued bonds for said paving, then interest shall be paid by said Highway Commission to such County at the rate borne by the bond of said County, such interest to be paid semi-annually. No payments shall be made under this clause for roads constructed under reimbursement agreements referred to in clause (*c*) of this Section.

"(*b*) The amounts which the State Highway Commission has or shall have by agreements made with Counties or highway or bridge districts since the passage of Act No. 731 of the Acts of 1924, or hereafter made, agreed to pay as reimbursement for constructing State highways, or for advancing money for said purposes shall be reimbursed or paid to such County or highway or bridge districts. All unpaid obligations of the State Highway Commission coming under the provisions of this clause shall bear interest at the rate borne by any bonds or other obligations issued by Counties or highway or bridge districts for the purpose of obtaining funds advanced and/or used for the construction of State highways. In any case where any County or highway or bridge district has advanced money to the State Highway Commission from sources other than from the sale of bonds or notes bearing a fixed rate of interest, the interest paid on such amounts shall be at the rate of four and one-half per centum per annum, payable annually. Payments of interest required by this Section to be made at the rate borne by bonds or other obligations shall be made at or be-

fore the times when the interest on said bonds or other obligations fall due. The interest required to be paid to Counties or highway or bridge districts under the provisions of this Section shall be computed from the date of approval of this Act by the Governor.

"(*c*) In any case where the portion of the gasoline tax which is required by laws enacted prior to this Act to be distributed to Counties has been lawfully pledged in whole or in part for, or is required by law to be applied, in whole or in part, to the payment of the principal and/or interest of any bonds or other obligations, the State Highway Commission shall pay said principal and/or interest at or before the times when said principal and/or interest become due. The payments and reimbursements required by this Section shall have priority over any other payments authorized or required by law to be made out of the gasoline tax or other current income of the State Highway Department."

"SECTION 4. *In Lieu of Former Tax.*—The license tax of six (6) cents per gallon on gasoline as herein levied and provided for shall be in lieu of the gasoline tax of five (5) cents per gallon heretofore levied, assessed and collected by law. All provisions of law now relating to the collection of the gasoline tax are hereby re-enacted."

* * * * * * *

"Approved the 16th day of March, A. D. 1929."

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 504

EASTERN AIR TRANSPORT, INC., COMPLAINANT, APPELLANT,

v.

SOUTH CAROLINA TAX COMMISSION AND W. G. QUERY, J. P. DERHAM AND FRANK C. ROBINSON, AS MEMBERS OF SOUTH CAROLINA TAX COMMISSION, RESPONDENTS, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF SOUTH CAROLINA.

REPLY BRIEF ON BEHALF OF APPELLANT.

WILLIAM H. WHITE, JR.,
American Security Building,
Washington, D. C.,
Counsel for Appellant.

INDEX.

Subject Index.

	Page
Classification of appellees' authorities	1
Property taxes	2
Mining and manufacturing tax	4
Nature of South Carolina tax	6
Conclusion	7

Table of Cases Cited.

Adams Express Co. v. Ohio, 165 U. S. 194	3
American Mfg. Co. v. St. Louis, 250 U. S. 459	4
Central Transfer Co. v. Commercial Oil Co., 45 Fed. (2d) 400	5
Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282	7
Games v. Stiles, 14 Pet. 322	2
Gibbons v. Ogden, 9 Wheat. 1	8
Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196	3
Gregg Dyeing Co. v. Tax Commissioner, October Term, 1931, Docket No. 170	2, 6
Helson v. Kentucky, 279 U. S. 245	5, 6, 10
Hump Hairpin Mfg. Co. v. Emmerson, 258 U. S. 290	5
Indian Motocycle Co. v. United States, 283 U. S. 570	4, 10
Lemke v. Farmers' Grain Co., 258 U. S. 50	7
McGregor v. Hogan, 263 U. S. 234	2
Mid-Continent Air Express v. Lujan, 47 Fed. (2d) 266	6
Minnesota v. Barber, 136 U. S. 313	4
Old Dominion Steamship Co. v. State of Virginia, 198 U. S. 299	2
Panhandle Oil Co. v. State of Mississippi, 277 U. S. 218	9
Public Utilities Commission v. Landon, 249 U. S. 236	7
Spalding & Bros. v. Edwards, 262 U. S. 66	5
Superior Oil Co. v. Mississippi, 280 U. S. 390	6, 8
United States Airways v. Shaw, 43 Fed. (2d) 148	6

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 504

EASTERN AIR TRANSPORT, INC., COMPLAINANT, APPELLANT,

v.

SOUTH CAROLINA TAX COMMISSION AND W. G. QUERY, J. P. DERHAM AND FRANK C. ROBINSON, AS MEMBERS OF SOUTH CAROLINA TAX COMMISSION, RESPONDENTS, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF SOUTH CAROLINA.

REPLY BRIEF ON BEHALF OF APPELLANT.

With the exception of two cases, all of the authorities cited in the brief of appellees fall into one of two classes:

Taxes on property.

Taxes on mining, or manufacturing.

Property Taxes.

The South Carolina gas tax here involved is not a property tax. This we think will be conceded. Nevertheless, we point to the allegation of the petition, paragraph 18, page 8 of the record, which alleges that the tax is not a property tax, the answer of the respondent at page 21 of the record, which admits that it is not a property tax; the opinion of the Court of Appeals of South Carolina in *Gregg Dyeing Co.* v. *Tax Commissioner*, which holds that it is not a property tax (see page 7, appellant's main brief), which opinion is entitled to very careful consideration from this Court (*Games* v. *Stiles*, 14 Pet. 322, 328, *McGregor* v. *Hogan*, 263 U. S. 234), and to the fact that the tax itself has not the slightest resemblance to a property tax. For example: it is not assessed; it bears no relation whatever to the value of the property concerned; the property would remain indefinitely in the hands of its owner or possessor, without tax, unless and until sold or used.

The fact that the State of South Carolina might impose a property tax on this gasoline, which would result in no greater burden upon interstate commerce than the present tax, is of course beside the mark. It is conceded that the State of South Carolina can impose a tax upon property, even though such property be used in interstate commerce. It could, for example, impose a tax on appellant's airplanes used only in interstate commerce, provided they had a situs for purposes of taxation within the State of South Carolina. *Old Dominion Steamship Co.* v. *State of Virginia*, 198 U. S. 299. But, this Court has held that such a

tax *must be a property tax. Adams Express Co.* v. *Ohio,* 165 U. S. 194. We are not concerned with some other kind of tax which South Carolina might impose which would be constitutional—we are concerned only with what South Carolina seeks to do through the medium of the tax now under consideration.

The essential distinction between a property tax and an excise tax, such as the one here involved, is that in the former there is always a point where the tax ceases to be a tax and becomes confiscation. When that point is reached, the courts step in and grant relief. But, in the case of an excise tax of the character here involved, there is no such limit. If South Carolina can impose a tax of 6 cents per gallon upon a special type of gasoline intended for use in, and used only in, aircraft engaged in carrying passengers and United States mail in interstate commerce, it can impose a tax of 60 cents on the same gasoline. It takes no imagination to appreciate that the imposition of taxes of this character by each and every State in which this appellant might be compelled to refuel its planes would soon put an end to its interstate air transportation, and terminate its ability to carry out its contract to carry the United States mail, to say nothing of similar results in the even longer journey by air across the continent, from New York to Los Angeles. This Court long since recognized such a possibility, for said Justice Field in *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 205:

> "If such a tax can be levied at all, its amount will rest in the discretion of the State. It is idle to say that the interests of the State would pre-

> vent oppressive taxation. Those engaged in foreign and inter-State commerce are not bound to trust to its moderation in that respect; they require security. And they may rely on the power of Congress to prevent any interference by the State until the act of commerce, the transportation of passengers and freight, is completed."

Nor does the fact that the burden of this tax, or a tax of even greater burden, would fall upon the people of South Carolina and this appellant *equally*, give it any validity. This was pointed out by Mr. Justice Harlan in *Minnesota* v. *Barber*, 136 U. S. 313, 326:

> "To this we answer, that a statute may, upon its face, apply equally to the people of all the States, and yet be a regulation of interstate commerce which a State may not establish. A burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute."

Mining and Manufacturing Tax.

Mining and manufacturing are not commerce. That has been so often held by this Court that it seems needless to cite authorities. As to the mining and manufacturing cases, such as *American Manufacturing Co.* v. *St. Louis*, 250 U. S. 459, and the others of the same category, cited by the appellees, it would seem to be sufficient to merely quote the language of this Court in a case dealing with a *sales tax*, to wit: *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, 575, where Mr. Justice Van Devanter, speaking for a majority of the Court, said:

"The cases of Cornell v. Coyne, 192 U. S. 418, 48 L. Ed. 504, 24 S. Ct. 383, and American Mfg. Co. v. St. Louis, 250 U. S. 459, 63 L. Ed. 1084, 39 S. Ct. 522, cited by counsel for the Government, are not pertinent; for both related to taxes distinctly imposed on manufacturing."

See also *Spalding & Bros.* v. *Edwards*, 262 U. S. 66, which involved a New York State *tax* upon the *sale* of goods manufactured and sold for export, where it was held that the State tax could not apply.

The two cases which do not fall within either category above pointed out are *first*, *Hump Hairpin Mfg. Co.* v. *Emmerson*, 258 U. S. 290. That case involved an Illinois law taxing foreign corporations doing business in the State, which tax was based upon the proportion of capital stock actually represented by property located, and business transacted, within the State, as provided by the State law. The tax was in the nature of a franchise tax, but in its essence was a property tax. The mere statement of the character of the tax involved is sufficient to differentiate it from the tax in this case.

Second. Central Transfer Co. v. *Commercial Oil Co.*, 45 Fed. (2d) 400, which is referred to in our main brief at page 30 as being the *single* case—with the exception of this appeal—wherein the United States District and Circuit Courts have failed to give to *Helson* v. *Kentucky*, 279 U. S. 245, the construction contended for by us. The Central Transfer Company case was "dismissed for want of jurisdiction" so that District Judge Faris' comments on the Helson case are really *obiter*, and not entitled to the consideration which should be

given to the opinions of Circuit Judges Cotterell and Phillips in *United States Airways* v. *Shaw*, 43 Fed. (2d) 148, and *Mid-Continent Air Express* v. *Lujan*, 47 Fed. (2d) 266, respectively.

Nature of the South Carolina Tax.

The tax in this case is clearly not a tax on property, nor is it a tax on mining or manufacturing. It is denominated a license tax in the statute itself, but it is in fact in the nature of a consumption tax. This, we submit, is obvious from the Act itself, which imposes a tax upon the gasoline when sold, consigned or *used*. Any question as to the nature of the tax would seem to be set at rest by the language of the Supreme Court of South Carolina in *Gregg Dyeing Co.* v. *Tax Commissioner*, which hold that the public policy of the State "is that all *consumers* shall pay the gallonage tax of six cents" (italics ours), which clearly makes it a tax on consumption or use, so that under the most restricted and limited construction which can be placed upon *Helson* v. *Kentucky, supra*, the South Carolina statute is void, at least as far as taxing gas bought by appellant for *use* in interstate commerce.

Here the consumer is a corporation regularly engaged in interstate commerce, which buys a type of gasoline intended for use in airplanes and which is not suitable for use in automobiles. In other words, it is an example of what Mr. Justice Holmes characterized in *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, as "sales made with a view to a certain result", rather than "those made simply with indifferent knowledge that the buyer contemplates that result". In *Superior*

Oil Co. v. *Mississippi*, the Court's language rather suggests that had the sales there been made with a view to a certain result, as in this case, and had the facts indicated a "manifest certainty of the destination" of the gasoline as in this case, instead of a fictitious destination, the Court's conclusions would have been quite different. In this case, there not only exist "sales made with a view to a certain result", but those made with a "manifest certainty of the destination" of the article sold, to wit: its use in interstate commerce as a part of a regular organized scheme of business equal in character and dignity and importance to that passed upon by this Court in *Lemke* v. *Farmers' Grain Co.*, 258 U. S. 50; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, and other cases referred to in our main brief.

Conclusion.

In *Public Utilities Commission* v. *Landon*, 249 U. S. 236, 245, Mr. Justice McReynolds says:

> "Interstate commerce is a practical conception and what falls within it must be determined upon consideration of established facts and known commercial methods."

Interstate air transportation is a new method of transporting mail and passengers, particularly in transcontinental journeys, but it does not require the imagination of a Jules Verne to visualize, based upon the progress of the last few years, what the future of air transportation in this country will be. The tremendous speed of aircraft at the present time, and an almost unlimited speed in the future, make it es-

sentially an instrument not only of interstate, but also of international commerce—a fact recognized by the control already assumed over it by the laws of Congress as well as by the various treaties of the world nations in convention assembled. It perhaps is no exaggeration to say that air transportation of the future, compared with that of today, is just about where steamboat transportation of today is, compared with its condition when this Court was called on to pass upon the monopoly granted by the State of New York to Robert Livingston and Robert Fulton for the exclusive navigation "of all the waters within the jurisdiction of that State, with boats moved by fire or steam." *Gibbons* v. *Ogden*, 9 Wheat. 1. One may well shudder to think of what maritime steam transportation in this country would be, had the Court sustained the contentions of Livingston and Fulton. The question of whether the State of South Carolina is to receive 6 cents on every gallon of gasoline purchased by this appellant for use in its interstate commerce sinks into insignificance, compared to the question of whether this new, great and growing means of commerce is to be throttled and burdened by the forty-eight states, in any one or more of which an airplane engaged in interstate commerce may stop to refuel. We think it no exaggeration to suggest that the problem now before this Court may, in years to come, prove to be as far-reaching as was the problem decided by Chief Justice Marshall in *Gibbons* v. *Ogden, supra.*

No one could possibly take issue with the language of this Court, expressed by Mr. Justice Holmes in *Superior Oil Co.* v. *Mississippi, supra,* at 395:

> "The importance of the commerce clause to the Union, of course, is very great. But it also is important to prevent that clause being used to deprive the states of their lifeblood by a strained interpretation of facts."

To sustain the appellant's contention in this case would not deprive the State of South Carolina of its "lifeblood", nor would it deprive States generally of the right to enact sales taxes. Such taxes would clearly not be a burden upon interstate commerce, except in rare and exceptional cases, that is to say, in a case like this one, where interstate commerce cannot be carried on without purchasing an instrumentality thereof, within the confines of a State, through which such commerce regularly passes; where there is a usual, customary and recognized course of interstate business, and where the State tax results in imposing an undue burden on that business—it would only be in cases of this sort where the State sales tax law would not be applicable, and even there, as to such interstate business only. We cannot, of course, attempt to define what is and what is not a burden upon interstate commerce, but we believe that based upon the decisions of this Court, the above suggestion is entirely proper. The State law would remain in full force and effect, except as to those cases where this or some other court of competent jurisdiction had held that it imposed a burden upon interstate commerce.

We respectfully point to the various cases cited in our main brief, which we believe sustain our contentions, and particularly such cases as the Grain cases, above referred to; *Panhandle Oil Co.* v. *State of Mis-*

sissippi, 277 U. S. 218; *Indian Motocycle Co., supra*, and last but by no means least, the decisions of the two Circuit Courts (both acquiesced in by the States of New Mexico and Oklahoma since no appeal in either case was taken), and the one District Court which have passed on almost this exact question, in the opinions in which cases they interpreted this Court's ruling in *Helson* v. *Kentucky, supra.*

We respectfully submit that the authorities cited by appellees—no one of which deals with a *sales* or *consumption* tax—are not pertinent to the issues in this appeal; that upon principle and authority the court below erred in failing to grant an interlocutory injunction; that as to appellant's interstate business the South Carolina law is repugnant to the Commerce Clause of the Constitution; and that appellant is entitled to such relief from this Court as will enable it to conduct its interstate passenger and mail aircraft flying business free from the burdens now imposed upon it by the State of South Carolina.

Respectfully submitted,

WILLIAM H. WHITE, JR.,
Counsel for Appellant.

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Supreme Court of the United States

OCTOBER TERM, 1931

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EASTERN AIR TRANSPORT, INC., APPELLANT

VERSUS

SOUTH CAROLINA TAX COMMISSION AND W. G. QUERY, J. P. DERHAM, AND FRANK C. ROBINSON, AS MEMBERS OF SOUTH CAROLINA TAX COMMISSION, APPELLEES.

APPELLEES' ARGUMENT

JOHN M. DANIEL,
Attorney General for South Carolina.

J. FRASER LYON,
Solicitor for Appellees.

THE R. L. BRYAN CO., COLUMBIA, S. C.
2-24-32-60

Supreme Court of the United States

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APPELLEES' ARGUMENT

JOHN M. DANIEL,
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J. FRASER LYON,
Solicitor for Appellees.

STATEMENT

Eastern Air Transport, Inc., operates its aeroplanes into and through South Carolina and does only an interstate business. Its planes make landings at several airports in South Carolina and at such points purchase gasoline for propelling its planes so operated. All of the airports are served by improved highways of the State and counties in which the ports are located and the cost thereof is paid from funds derived from persons and corporations who pay a tax for the privilege of selling gasoline within the State.

Standard Oil Company is duly licensed to sell gasoline within South Carolina and pays a tax at the rate of six cents per gallon on all gasoline it sells within the State and six cents per gallon on all it uses in its own business in the State. This tax applies to all persons and corporations engaged in the business of selling gasoline in South Carolina. Standard Oil Company sells, at the airports in South Carolina, to Eastern Air Transport, Inc., such gasoline as it requires for the propelling of its aeroplanes in interstate commerce.

Eastern Air Transport, Inc., is not a dealer in gasoline and pays no tax to the appellees, or other state agency in South Carolina for the privilege of dealing in gasoline, nor does it pay a tax on the use of gasoline, and no demand has ever been made upon it to pay and it has never paid to any officer or agent of South Carolina any tax on gasoline whatsoever. It is true that Standard Oil Company asserts that when it makes a sale of gasoline to Eastern Air Transport, Inc., it adds to the price six cents per gallon to cover the amount of tax it is required to pay as a seller of gasoline within the State.

The Act of the Legislature places no tax upon the use of gasoline save such as a licensed dealer uses in carrying on his or its business within the State. In other words, a licensed dealer in gasoline pays a tax of six cents per gallon on all gasoline he sells and on all he uses within the State. The Act is set forth on page 4, Section 13, of the transcript of record.

Standard Oil Company is required to pay the tax no matter if it does or does not increase the price of gasoline per gallon by the amount of the tax. The tax applies upon all sales made within the State regardless of whether the purchaser is engaged in interstate or intrastate business, or whether it is used for pleasure or profit, except in case of sales made to agencies of the United States Government. It makes no difference, so far as this tax is concerned, whether Standard Oil Company adds six cents per gallon to the price of gasoline sold to Eastern Air Transport, Inc. In any event, the oil company is required to pay the six cents per gallon on all gasoline it sells and uses in its business within the State.

We think there is only one question to be decided:

Is the requirement that oil companies pay a license or occupation tax measured at the rate of six cents per gallon on gasoline sold, a direct burden on interstate commerce when gasoline is sold and delivered within the State to one who intends to and does thereafter use the gasoline to propel his or its aeroplanes used in carrying on interstate commerce?

It is admitted that when appellant purchases gasoline in South Carolina from Standard Oil Company, a licensed dealer, it intends to use the same in its aeroplanes which are engaged solely in interstate commerce. If, however, it should desire to use such gasoline otherwise, it has the power and privilege so to do, as the State does not concern itself with the disposition of gasoline after sale is made by a licensed dealer.

It is the contention of appellees that the sale of gasoline completed within the State is not a transaction in interstate commerce and it makes no difference whether at the time of the sale appellant intended to and did thereafter use the gasoline so purchased in carrying on interstate commerce. This principle, we submit, is well established by the following decisions of this Court:

Heisler v. Thomas Colliery Co., 260 U. S., 245.

Oliver Iron Co. v. Lord, 262 U. S., 172.
Hope Natural Gas Co. v. Hall, 274 U. S., 284.
American Mfg. Co. v. St. Louis, 250 U. S., 459.
Crescent Oil Co. v. Mississippi, 257 U. S., 129.
Hump Hairpin Mfg. Co. v. Emmerson, 258 U. S., 290, 42 Sup. Ct. Rep., 305-307.
See also *Central Transfer Co. v. Commercial Oil Co., et al.*, 45 Fed. Rep., 2d., 400.
Diamond Match Co. v. Ontonagon, 188 U. S., 82, 23 Sup. Ct. Rep., 266.

Referring to a sales tax on gasoline, the Supreme Court of New Mexico said:

> "Here, we have a tax not directed at or discriminating against interstate commerce; not directly imposed upon it or those engaged in it; affecting it only as any tax must burden any commerce. It is not exacted as the price or condition of doing business in that state. The burden on interstate commerce does not result from the statute itself, but from the situation of appellee and the exigencies of its business. We think that such a tax is within the power of the State and not regulatory of, and only incidentally burdensome to, interstate commerce."
>
> *Transcontinental and Western Air, Inc., v. Lujan, Comptroller State of New Mexico*, opinion rendered Dec. 21, 1931. See The United States Daily, Dec. 29, 1931, page 6, column 1.

Error is assigned because the District Court held that "the upkeep of such roads leading to the cities near which its airports are located facilitates its business and increases its patronage" and states there is no evidence in the record to sustain such finding.

In response to this exception, reference is craved to pages 28 and 29 of the transcript of record wherein is set forth in detail the improved highways that serve the airports at which appellant lands its planes. These roads are, with the exception of such as lie within the corporate limits of the cities near the airports, built and maintained by the expenditure of the gasoline

tax. The District Court was not in error when it found that such roads facilitated plaintiff's business and increased its patronage. This is patent. Certainly plaintiff would have no business and no patronage whatsoever if there were no roads leading to its landing places. Besides, this was in reference to plaintiff's allegation that it received no benefit from the tax (T. page 9, Section 26).

Other assignments of error are generally to the effect that the District Court should have found that the tax in question was upon the use of gasoline.

We think a casual reading of the Act, together with the affidavit of W. G. Query, chairman of South Carolina Tax Commission (Transcript of record, pages 24-27, inclusive), will make it clearly appear that the tax on gasoline sold by Standard Oil Company to Eastern Air Transport, Inc., is not a tax on the use of gasoline, but is a tax on Standard Oil Company for the privilege of selling gasoline to its customers within the State. It is true appellant alleges, paragraph 17 bill of complaint (Transcript of Record, page 8), that the tax of six cents per gallon on gasoline is paid by it to the oil company from which it buys gasoline, and that the oil company collects the tax as agent of the appellees, and otherwise it is endeavored to make it appear by the complaint that the tax is charged against appellant and is collected by the oil company making the sale and such oil company as collecting agent delivers it to the appellees, who are agents of the State of South Carolina.

The Act, as quoted in the bill of complaint (Transcript, pages 4-7), shows that such statement is incorrect as a matter of law, besides the affidavit of J. C. King (Transcript, pages 14 and 15), offered by appellant, shows:

> "That on account of the South Carolina gasoline tax the sum of six cents per gallon is added to the price of all gasoline sold by Standard Oil Company of New Jersey in South Carolina. . . ."

And further:

> "That Standard Oil Company of New Jersey would not sell gasoline in South Carolina to Eastern Air Transport,

Inc., or to any other purchaser, unless the additional sum of six cents per gallon was paid to cover the South Carolina gasoline tax."

The affidavit of W. G. Query, chairman of South Carolina Tax Commission, transcript, page 23, states:

"That Eastern Air Transport, Inc., has not applied for, nor has it been issued a license to deal in gasoline or otherwise dispose of gasoline within the State of South Carolina. That Eastern Air Transport, Inc., has paid no tax whatsoever to South Carolina Tax Commission and that any allegation in the bill of complaint herein which may allege directly or by inference that complainant has paid any tax to the Tax Commission or to any agent of the Tax Commission for the privilege of using gasoline in its aeroplanes or otherwise is without foundation in either law or in fact."

See also affidavit of W. G. Query, transcript, page 25, and the first separate defense set up in the verified answer, transcript, page 22.

Therefore we say that it clearly appears by the Act of the Legislature in question and the affidavits of Mr. King and Mr. Query, there is no tax claimed against Eastern Air Transport, Inc., on account of the use of gasoline in its interstate aeroplanes.

All of which is respectfully submitted for the consideration of this honorable Court.

JOHN M. DANIEL,
Attorney General for South Carolina.

J. FRASER LYON,
Solicitor for Appellees.

OPINION

SUPREME COURT OF THE UNITED STATES.

No. 504.—October Term, 1931.

Eastern Air Transport, Inc., Appellant, *vs.* South Carolina Tax Commission and W. G. Query, J. P. Derham, and Frank C. Robinson.	Appeal from the District Court of the United States for the Eastern District of South Carolina.

[March 14, 1932.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This suit was brought to restrain the collection of a tax, imposed by the State of South Carolina, of six cents a gallon with respect to gasoline purchased by complainant in that State and used by complainant in interstate commerce. The complainant charged that the State Act placed a direct burden upon interstate commerce and hence was repugnant to the commerce clause of the Federal Constitution. Art. 1, sec. 8. The District Court, composed of three judges as required by statute, denied an interlocutory injunction (52 Fed. (2d) 456) and the complainant appeals to this Court. Jud. Code, sec. 266; U. S. C., Tit. 28, sec. 380.

From the findings of the District Court it appears that the complainant is a Delaware corporation operating, in interstate commerce, air transport lines across the State of South Carolina; that its planes make regular stops at various points in the State but do not carry freight or passengers between such points, and practically its entire business is interstate in character; that it purchases gasoline in South Carolina for the use of its planes and that the seller adds to the price the amount of the State gasoline tax which the seller is required to pay under the Act in question, and thus complainant has to pay six cents a gallon more than it otherwise would, the excess amounting to about $5,000 a year.

The tax is described in the statute[1] as a license tax which, as applied in the instant case against the dealer, is for the privilege of carrying on the business of selling gasoline within the State. The tax is thus imposed upon the seller and the sales in question are intrastate sales. The appellant emphasizes the fact that the tax has been construed by the Supreme Court of the State to be an excise tax and not a property tax. *Gregg Dyeing Company* v. *Query*, Supreme Court of South Carolina, decided April 13, 1931. So far as the present question is concerned, the distinction is not important. If such a license tax for the privilege of making sales within the State were regarded as in effect a tax upon the goods sold,[2] its validity could not be questioned in the circumstances here disclosed, as in that aspect the tax would be upon a part of the general mass of property within the State and hence subject to the State's authority to tax, although the property might actually be used in interstate commerce.[3] "It is elementary", said the Court in *New Jersey Telephone Company* v. *Tax Board*, 280 U. S. 338, 346, "that a State may tax property used to carry on interstate commerce." Treating the tax as an excise tax upon

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[1]Act of February 23, 1922, as amended (South Carolina Acts, 1922, pp. 835-838; 1929, pp. 107-112). Section 1 provides: "That every oil company, person, firm or corporation doing domestic or intra-state business within this State, and engaging in the business of selling, consigning, using, shipping, or distributing for the purpose of sale within this State, any gasoline or any substitute therefor, or combination thereof, for the privilege of carrying on such business shall be subject to the payment of a license tax, which tax shall be measured by and graduated in accordance with the volume of sales of such oil company within the State. Every such oil company shall pay to the State an amount of money equal to six (6) cents per gallon on all gasoline, combinations thereof, or substitute therefor, sold, consigned, used, shipped or distributed for the purpose of sale within the State. . . ."

[2]Brown v. Maryland, 12 Wheat. 419, 444; Welton v. Missouri, 91 U. S. 275, 278; Kehrer v. Stewart, 197 U. S. 60, 65.

[3]Coe v. Errol, 116 U. S. 517, 525; Adams Express Co. v. Ohio, 165 U. S. 194, 220; 166 U. S. 185, 218; Galveston, Harrisburg & San Antonio Rwy. Co. v. Texas, 210 U. S. 217, 227; Wells, Fargo & Co. v. Nevada, 248 U. S. 165, 167; Heisler v. Thomas Colliery Company, 260 U. S. 245, 259; Sonneborn Bros. v. Cureton, 262 U. S. 506, 509, 515; New Jersey Telephone Co. v. Tax Board, 280 U. S. 338, 346; Superior Oil Co. v. Mississippi, 280 U. S. 390, 395.

the sales[4] does not change the result in the instant case, as the sales are still purely intrastate transactions. *Superior Oil Company* v. *Mississippi*, 280 U. S. 390, 395. Undoubtedly, purchases of goods within a State may form part of transactions in interstate commerce and hence be entitled to enjoy a corresponding immunity.[5] But the mere purchase of supplies or equipment for use in conducting a business which constitutes interstate commerce is not so identified with that commerce as to make the sale immune from a non-discriminatory tax imposed by the State upon intrastate dealers. There is no substantial distinction between the sale of gasoline that is used in an airplane in interstate transportation and the sale of coal for the locomotives of an interstate carrier, or of the locomotives and cars themselves bought as equipment for interstate transportation. A non-discriminatory tax upon local sales in such cases has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected.

In *Helson* v. *Kentucky*, 279 U. S. 245, upon which the appellant relies, the tax was laid by Kentucky with respect to gasoline purchased by the plaintiffs in error in Illinois and used within Kentucky in the operation of a ferry boat on the Ohio River between the two States. The Court found that the tax was laid directly upon the *use* of the gasoline in interstate transportation. The Court said that "The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce." *Id.*, p. 252. Such a tax is manifestly different from a general property tax or a tax upon purely local sales.

Decree affirmed.

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[4]Panhandle Oil Co. v. Knox, 277 U. S. 218, 222; Indian Motocycle Co. v. United States, 283 U. S. 570, 574, 575.

[5]Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 290, 291; Lemke v. Farmers Grain Co., 258 U. S. 50; Stafford v. Wallace, 258 U. S. 495, 516; Shafer v. Farmers Grain Co., 268 U. S. 189, 198.